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Supreme Court, U.S.
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In The OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

NEW ENGLAND POWER COMPANY
Intervenor.

Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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164 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming an order of the Federal Energy Regulatory Commission for the imposition of a stranded cost charge relating to the Town of Norwood which conflict with the FERC's own Regulation governing imposition of stranded costs issued under Order 888 and the Energy Policy Act of 1992 governing wholesale open access and precluded the Town from being able to compete with the New England Power Company ("NEP") and its affiliate large distribution companies.

2. Whether the court of appeals erred in affirming the FERC's order approving stranded cost charges relating to Norwood, which exceeded FERC's authority under the Federal Power Act, precluding the Commission from awarding contract damages, created uncertainty as to the jurisdiction of the courts to award contract damages, and since not based on any review or evaluation as to whether there had been any breach of contract by NEP or Norwood, was arbitrary and capricious under Section 5 of the Administrative Procedure Act.

3. Whether the court of appeals, in approving the FERC's stranded cost order where the Power Contract between Norwood and NEP required Norwood to pay only for power delivered by NEP and did not include any authorization for unilateral imposition of liquidated damages by NEP, is in violation of this Court's *Mobile-Sierra* doctrine precluding any change by the Commission to agreed contract terms between the parties without meeting a public interest burden of proof which did not exist in the case.

4. Whether the court of appeals erred in affirming a retroactive application of NEP's stranded cost filing relating to Norwood at FERC after Norwood had terminated its existing

contract, contrary to this Court's decision in *Arkansas-Louisiana Gas Co. v. Hall*, and where NEP did not comply with the requirements of the FERC's Regulations governing new rate filings.

5. Whether the court of appeals erred in that part of FERC's order which refused to evaluate whether NEP's stranded cost filing relating to Norwood, which was twice as high as NP's agreed to CTC with its affiliates in competition with Norwood, was unduly discriminatory, in violation of Sections 212 and 205 of the Federal Power Act.

RULE 14(1)(b) STATEMENT

The petitioner is the Town of Norwood, Massachusetts. The Federal Energy Regulatory Commission is the respondent. The New England Power Company is an intervenor in the court of appeals below.

The case was consolidated at the court of appeals with another case involving different issues brought by the Northeast Center for Social Issue Studies, as petitioner and the Federal Energy Regulatory Commission, as respondent, involving a different part of the same orders of the Federal Energy Regulatory Commission.

RULE 29.6 STATEMENT

Under Rule 29.6, the Town of Norwood believes that New England Power Company, intervenor, is a corporation which is a subsidiary of the New England Electric System which also owns Massachusetts Electric Company and Narragansett Electric Co.

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TOWN OF NORWOOD, MASSACHUSETTS
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, App.1a-27a is reported at 202 F.3d 392 (1st Cir. 2000). The order of the United States Court of Appeals for the First Circuit denying the "petition for panel rehearing" by the Town of Norwood was entered on March 1, 2000, App. 119.

The opinions of the Federal Energy Regulatory Commission (App. 28a-119a) are reported at 81 FERC ¶61,281 (November 26, 1997); 82 FERC ¶61,179 (February 25, 1998); 83 FERC ¶61,174 (May 15, 1998); 83 FERC ¶61,265 (June 3, 1998); 83 FERC ¶61,275 (June 10, 1998); and 84 FERC ¶61,175 (August 5, 1998).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2000. A petition for panel rehearing by Norwood was denied on March 1, 2000. This Court's jurisdiction is invoked under 28 U.S. C. § 1254(1). The court of appeals had jurisdiction to review orders of the Federal Energy Regulatory Commission issued under the Federal Power Act under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes for this petition for review are Sections 205, 212, and 313(b) of the Federal Power Act, 16 U.S.C. § 824d, 824k and 825*l*(b) and Section 5 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), App. 7a. The pertinent regulations are 18 C.F.R. § 35.26, and 18 C.F.R. § 35.13. Copies of these statutes and regulations are appended to this brief, App. 119a-125a.

STATEMENT OF THE CASE

This petition involved three separate cases filed by NEP in 1997-1998 at the FERC, which is vested with regulatory jurisdiction under the Federal Power Act ("FPA") over wholesale sales of electric power in interstate commerce. [1]

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[1] The FERC has no jurisdiction to adjudicate the Federal Antitrust Laws. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California v. FPC*, 369 U.S. 482 (1962); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-948 (1948) (1st Cir. 1993).

(Footnote 1 continued on next page)

Prior to the events of this case, NEP was the largest provider of low-cost requirements wholesale electric power in New England, which then served its own large distribution company affiliates, including Massachusetts Electric Company ("Mass. Electric") and Narragansett Electric Company ("Narragansett"), constituting over 97 percent of its total sales, at rates set by the FERC under the just and reasonable standard of Sections 212 and 205 of the FPA, 16 U.S.C. §§ 824a and 824d, on a cost-of-service basis.

Norwood had gained access to this Tariff 1 service pursuant to an antitrust Decree and Order of April 12, 1983 in the Federal District Court, MA, and was receiving its requirements wholesale power at the same cost-of-service regulated rates as NEP provided to its own large affiliates, Mass. Electric and Narragansett, who competed with Norwood for customers in the same retail market areas.

On September 30, 1996, NEP voluntarily negotiated a plan (from which Norwood was excluded) not required by Federal law or regulations, to divest itself of its power supply facilities,[2] terminate the historic cost-of-service regulation by

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(Footnote 1 cont'd)

The FERC also does not have exclusive jurisdiction over breach of contract cases adjudicated in federal and state courts. *FPC v. Sierra Pacific Power Corp.*, 350 U.S. 348 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Southern California Edison Co.*, 85 FERC ¶61,023 (1998).

[2] Section 201 of the FPA provides that:

(Footnote 2 continued on next page)

the FERC over such power to NEP's large distribution company affiliates under NEP's Tariff 1, and to obtain unregulated market-based pricing. This plan was contingent on NEP's collection of up to $7.6 billion in stranded costs under the FERC's Order No. 888,[3] and the setting of agreed-to fixed low "standard offer" prices to NEP's affiliates for up to 12 years, designed to give its affiliates an anticompetitive advantage to retain retail customers against other competitors in New England during an initial four years, followed by a rapid escalation of the fixed standard offer prices in the future, to upwardly bias future market prices in New England.

In the first case before the FERC, NEP filed at the FERC its divestiture agreement containing terms subjecting Norwood to the payment of an unascertained portion of the $7.6 billion in stranded costs. Norwood intervened objecting, *inter alia*, that this was contrary to the express provision of the Commission's Regulations under Order 888, excluding Norwood, as not being a transmission customer of NEP, from

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(Footnote 2 cont'd)

> The provisions of this subchapter shall apply to the transmission of electric energy and interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . .but [FERC] shall not have jurisdiction, except as specifically provided . . . over facilities used for the generation of electric energy....

16 U.S.C. §824(b).

[3] Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services By Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Regulations Preambles §31,036 (1991-1996); FERC Regulations §13,976 (1997).

any stranded costs.

Norwood also voluntarily [4] presented expert testimony demonstrating that the stranded costs were excessive, and did not comply with Order 888, and that the standard offer fixed prices were discriminatory against Norwood in violation of Order 888 and Sections 212(a) and 205(b) of the FPA, 16 U.S.C. §§824k(a) and 824d(b), and, accordingly, requested a hearing. The Commission did not consider Norwood's claims or evidence and denied any hearing in its brief letter order approving the agreement, but required that it be amended to preclude any applicability of the stranded costs to Norwood. App. 36a; 81 FERC ¶61,281, 62,371 (1997).

In the second case, NEP filed under Section 203 of the FPA for approval of its sale of limited facilities relating to its regulated sale of all of its non-nuclear power generation business to U.S. Generation Co. NE, a subsidiary of Pacific Gas & Electric Co. ("USGen/PG&E"); for deregulated rates and termination of Tariff 1 service to its affiliates; for fixed standard offer wholesale prices for its affiliates; and for conversion of Norwood's prior cost-of-service rate under Tariff 1 to a fixed rate contract over 20 percent higher than the wholesale rates available to its affiliates.[5] Norwood again intervened raising objections under Order 888 and the FPA and again voluntarily presented expert testimony as to the discriminatory impact of

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[4] No dates for submittal of such testimony were ever required of any party, because NEP urged immediate approval of its "settlement."

[5] Norwood's frozen rate resulted in a rate twenty percent higher than NEP's affiliates; NEP low standard offer fixed rate to its affiliates not available to Norwood, resulted in thirty percent higher rates for Norwood; and NEP's CTC on Norwood resulting in Norwood paying forty percent higher rates.

NEP's divestiture plan on Norwood.

The FERC, in an order issued February 25, 1998, approved NEP's termination of its cost-of-service Tariff 1 service to its affiliates, and the fixed prices for standard offer wholesale power, admittedly not based on any regulated cost of service, but accepted as "market base prices" without any analysis or hearing of Norwood's tendered expert evidence. FERC granted NEP's request that Norwood's Power Contract with NEP for regulated cost-of-service under Tariff 1 be converted to a fixed price contract for the future and precluded Norwood from the fixed below-market standard offer prices available only to NEP's affiliates. App. 85a; 83 FERC ¶61,275 (1998). This resulted in wholesale rates to Norwood 30 percent higher than those charged by NEP to its affiliates, and threatened the viability of Norwood's municipal electric system. Again, Norwood was denied any hearing or adjudication of the merits of its objections to NEP's divestiture plan.

Because of the adverse impacts of NEP's actions on Norwood and its duty to mitigate damages in its then pending complaint for breach of the contract and violations of the Federal antitrust laws (filed on April 14, 1997), Norwood entered into a power contract with an alternate supplier at market-based rates, which the FERC accepted on April 22, 1998 as Norwood's new filed rates effective April 1, 1998, which NEP never appealed. NEP, after Norwood had already terminated its contract, made a third unilateral filing at FERC to impose stranded cost payments (called "contract termination charges" ("CTC")) on Norwood which were twice as high as the stranded cost charges NEP had agreed to with its affiliates in the September 30, 1996 Agreement. NEP's new CTC relating to Norwood amounted to a charge to Norwood of $78 million for no power delivered by NEP over a ten-year period.

Norwood presented detailed expert testimony and exhibits to the FERC in support of its objections to NEP's filing for stranded costs against Norwood, showing that it would result in Norwood paying over 40 percent higher wholesale rates for electric power over those required by NEP from its distribution company affiliates, Mass. Electric and Narragansett. In orders issued May 15, 1998, and August 5, 1998, the FERC approved NEP's stranded cost filing applicable to Norwood without any analysis or hearing of Norwood's expert evidence that it directly conflicted with the FERC's regulations under Order 888 and other long-standing FERC precedents, and that it discriminated in violation of the FPA, Sections 212 and 205(b) against Norwood in favor of NEP's affiliates. App. 103a, 112a; 16 U.S.C. §§824k and 824d(b). App. 119a, 120a; 83 FERC ¶61,174 (1998); 84 FERC ¶61,175 (1999).

The court of appeals in its decision of February 2, 2000 affirmed the FERC's orders. App. 9a; 202 F.3d, 392 *et seq.*

The court of appeals agreed with Norwood that the Commission's regulations governing the imposition of stranded costs under Order 888 and the Energy Policy Act of 1992 governing wholesale open access, barred NEP from any stranded cost, because Norwood, by virtue of its antitrust litigation culminating in the 1983 Decree and Order, had already obtained open access over Boston Edison's transmission system, and was not a transmission customer of NEP. The regulations in Order 888 explicitly allowed stranded costs only where a departing customer had previously taken transmission service from the utility claiming stranded costs. This completely distinguished Norwood from NEP's affiliates, Mass. Electric and Narragansett, which had been expressly structured through corporation organization from the beginning to obtain their transmission services from NEP, which would provide wholesale transmission and power service to them solely under

FERC regulation to avoid any state regulation over such services.

The court of appeals, however, ruled that, "while Order No. 888 does not mandate the new tariff, neither does it forbid it." App. 10a; 202 F.3d at 399. The court did admit that both it and FERC considered NEP's CTC charge to be one "for stranded cost recovery in the present case." *Id.* Neither the court, nor FERC, identified the legal basis and rationale for such a charge and why the express language of the Commission's regulations authorizing a stranded cost only under the terms of that regulation did not bar such an alternate procedure.

The court also conceded that Norwood would not be subject to the imposition of any stranded costs because the regulations "excluded from stranded cost recovery those cases where a requirements contract was entered into or extended after July 11, 1994." App. 10a; 202 F.3d at 399. Norwood had entered such a contract revision with NEP after July 11, 1999, and NEP never sought to insert a clause authorizing it to charge stranded costs. Admitting this to be true, the court continued to uphold the Commission's approval of the CTC to Norwood on the ground that "the restrictions in Order No. 888 are no more than conditions on stranded cost recovery *under that order* and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer departs an existing contractual application." *Id.*

The court of appeals next rejected Norwood's claim that NEP's CTC relating to Norwood was an improper attempt by FERC to adjudicate breach of contract damages which it had no authority to do under the FPA, and improperly impinge on the jurisdiction of the courts to determine such issues. The court of appeals conceded that:

> Admittedly, the stranded cost recovery in the tariff is closely akin to contract damages, and the commission in the past has declined to adjudicate some contract disputes. *E.g.*, *Southern Cal. Edison Co.*, 85 FERC ¶61,023 (1998).

App. 11a; 202 F.3d at 400. The court admitted that

> Here, the Commission has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power . . . It merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations.

Id." But neither the court nor FERC explained how the Commission could determine the appropriate level of damages to be paid by either party without evaluating the issues as to whether Norwood or NEP has breached the contract, and if so what is the appropriate level of damages that a court would adjudicate under such circumstances, and how, in the absence of such an evaluation, its determination of a fixed payment by Norwood of $78 million over ten years does not interfere with the admitted jurisdiction of the courts to determine breach of contract and damages therefor.

The court of appeals then ruled that this Court's decisions under the *Mobile-Sierra* doctrine [6] "prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest." *Id.* Despite the fact that Norwood's Power Contract with NEP expressly authorized Norwood to pay NEP only for power delivered to it, required service under Tariff 1, a cost-of-service rate, and precluded any unilateral change by NEP under its tariff that conflicted with the Contract, the court affirmed the FERC's acceptance of NEP's stranded cost charge relating to Norwood.

The court of appeals ruled that NEP's CTC against Norwood did not violate the *Mobile-Sierra* doctrine, but simply gave Norwood an option "to terminate earlier (at a specified price)" . . . which "is certainly a detriment, but absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract." *Id.* Nowhere did the Commission or the court demonstrate that the CTC did not conflict with Norwood's Power Contract under the *Mobile-Sierra* test, or that it met the heightened public interest test required for authorization of such a contract change.

The court of appeals ruled that NEP's filing of its stranded cost charge after Norwood had given it notice of termination was not a retroactive ratemaking under this Court's precedents in *Arkansas-Louisiana Gas Co. v. Hall*, and *Federal Power Comm'n v. Sunray DX Oil Co.*. The court reached this result by ruling that the CTC is not collecting prior costs allegedly incurred by NEP before its divestiture of its facilities,

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[6] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 354-55 (1956).

but "would only govern Norwood as to its future purchases – or failures to purchase – from New England Power." App. 21a; 202 F.3d at 401.

Inconsistently, the court ruled that NEP was not required to follow the Commission's regulations relating to rates to govern future charges because:

> . . .The termination charge is not a new or increased rate for supplying energy. It is a formula-driven charge to recover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC [and that] the contract termination charge in no way represents a rate increase for Norwood.

Id.

The court of appeals affirmed FERC's orders imposing a CTC on Norwood which its experts had demonstrated was twice as high as the CTC set by NEP for its own affiliates in competition with Norwood, and which denied Norwood any of the below market standard offer service for wholesale power as not constituting undue discrimination under Section 212 of the FPA, as amended by the Energy Policy Act of 1992 and Section 205(b) of the FPA, 16 U.S.C. §§ 824k(a), 824d(b). The court ruled that such an undue preference was permissible where NEP had settled on its rates with its affiliates, by disregarding the holdings of the applicable cases that, only where an administrative hearing had been granted to the contesting party with an opportunity to litigate the proper rate, is such treatment permissible. In all three of the cases below, Norwood had

timely requested a hearing and had voluntarily filed affidavits of expert witnesses (despite no hearing procedures having been set at any time for such testimony) demonstrating genuine issues of fact as to the discriminatory treatment provided NEP's affiliates *vis a vis* Norwood. [7]

The court of appeals ruled that Norwood's exclusion from equal wholesale rates based on equal CTC payments and equal access to standard offer service was justified because, under Massachusetts law, "NEP has no obligation to offer retail standard offer rates as a backup for its retail customers." App. 18a; 202 F.3d at 403. This, however, was shown by Norwood's expert evidence to be irrelevant, where the issue is one of nondiscriminatory wholesale power rates subject to the exclusive jurisdiction of FERC under Sections 212 and 205(b) of the FPA, 16 U.S.C. §§ 824k(a) and 824d.

The court of appeals admitted that Norwood had duly requested a hearing with respect to the unilateral imposition by NEP of its CTC charge on Norwood, which Norwood's experts' affidavits demonstrated was twice as high as the CTC to which NEP and its affiliates had agreed. The Commission itself had made no attempt to evaluate Norwood's affidavits to resolve the disputed issues of fact involved, and never ordered any discovery or hearing procedures under the FPA. Norwood's claim that this violated its rights under the FPA was rejected by the court of appeals which acted as though

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[7] The court of appeals' reference to one interim ruling by an administrative law judge in the first proceeding, App. 16a; 202 F.3d at 402 is not in point. There, the judge had set no schedule for presenting prepared testimony, and his ruling was clearly mooted by subsequent events where Norwood, based on new contracts entered by NEP with USGen NE, appropriately filed expert testimony and exhibits supporting its position under the FERC's rules, which was accepted by FERC.

Norwood had had a full hearing and adjudication of the matter. Since Norwood's experts had delineated the substance of the claims, the issue was whether those disputed issues of fact required an adjudication on the merits by the Commission, which the court admits Norwood never received. *Id* at 404.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Not Requiring FERC To Comply With Its Own Regulations Governing The Imposition Of Stranded Costs, Upon Which Norwood Relied, Which Raises A Major Uncertainty As To The Administration Of Open Access Under Order 888

The Commission's regulations relating to stranded costs are clear and unambiguous:

> **Section 35.26 Recovery of Stranded Costs By Public Utilities And Transmitting Utilities**
>
> I. *Purpose.* --
>
> This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs.
>
> II. *Definitions.* –
>
> Wholesale stranded costs means any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service

to:

> (i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission service company of such public utility or transmitting utility.

18 C.F.R. § 35.26; emphasis added.

NEP's stranded cost filing relating to Norwood should have been rejected because it did not meet this requirement. Norwood has not been and will not subsequently become, in whole or in part, "an unbundled wholesale transmission service company" of NEP. The Decree and Order of the U.S. District Court issued April 12, 1983, *supra 3*, expressly approved a Settlement Agreement specifying that Norwood was a "transmission customer" of Boston Edison Company and would remain such a transmission customer responsible to pay Edison's transmission rates for the future.

Both the court of appeals and the FERC conceded that the Commission's regulations do not allow any stranded costs to be applied to Norwood. App. 8a-10a; 202 F.3d at 399. The Commission, in Order 888, expressly rejected any application of stranded costs in a situation like Norwood's:

> . . .We will retain the definition of "wholesale stranded costs" proposed in the Supplemental Stranded Cost NOPR. We believe it would be inappropriate to expand the definition to include the situation where a wholesale requirements customer (or a retail-turned-wholesale customer) ceases to purchase power from a utility without using the transmission services of

> that utility. Any costs that the utility might incur as a result of the requirements customer in this scenario would be outside the scope of this Rule. . . .

Order 888, FERC Regulations Preambles ¶31,036 at 31, 849 (1991-1996). *See also*, Order 888-A, FERC Regulations Preambles ¶31,048 at 30,348 (1997).

The court of appeals decision that the restrictions in the regulations "are no more than conditions on stranded cost recovery *under that order* . . ." (App. 10a-11a; 202 F.3d at 399) flies in the face of the plain language of the regulation that "this section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs." The Commission has no other regulation governing the collection of stranded costs other than Order 888 relating to that subject. Furthermore, the court of appeals admits that the CTC filing by NEP against Norwood in this case is "for stranded cost recovery in the present case . . ." Id; emphasis added. Similarly, the Commission in its orders approving a CTC for NEP's affiliates, Mass. Electric and Narragansett (which, unlike Norwood, are transmission customers of NEP) involve the imposition of stranded costs under Order 888. *New England Power Co.*, App. 28a; 81 FERC ¶61,281, 62,371; *order denying rehearing*, App. 34a; 83 FERC ¶61,265, 62,104 ("... the Settlement Agreements would amend Mass. Electric's and Narragansett's service agreements under Tariff 1 to . . . require the affiliated customers to pay NEPCO what is know as a Contract Termination Charge (CTC) which is designed to recover stranded costs associated with, *inter alia*, NEPCO's investment in generating assets, contractual commitments for purchase power and fuel transportation, deferred costs and other regulatory assets, plus a return on unrecovered costs.")); emphasis added. NEP's filing of its CTC as to Norwood also

stated it was designed to allow "NEP's recovery of any stranded costs consistent with the contract modifications."

Furthermore, the court of appeals agreed that Norwood, even if it were a transmission customer of NEP, would not have been subject to the imposition of any stranded costs under the Commission's regulations because the Power Contract between NEP and Norwood was extensively amended after July 11, 1994 and, at that time, NEP never inserted any condition for the collection of stranded costs, as required by the Commission's regulations. App. 10a-11a; 202 F.3d at 399. Here again, the court construed the Commission's regulations only as relating to "stranded cost recovery under that order [Order 888]." *Id.*

But nowhere does the court cite any other rule, regulation or legal authority authorizing the Commission to impose stranded costs under any conditions, much less the facts of the present case. In this regard, there is no precedent, regulation or law in support of such a charge and, therefore, it is unclear how the charge's lawfulness can be sustained. *See, e.g, Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Distrigas of Massachusetts Corp. v. FERC*, 773 F.2d 1208, 1210-11 (1st Cir. 1984).

The court of appeals decision raises great uncertainty as to what constitutes stranded costs governing the actions of parties under the open access regime ordered under Order 888. The court's ruling that the Commission's stranded cost Regulations in Section 35.26 which "establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs" do not apply raises a great cloud of uncertainty over this key matter which will impair decisions relating to open access. Review of these matters warrants granting the writ.

II. The Court of Appeals Decision Affirming NEP's CTC Is An Unlawful Award Of Contract Damages Over Which FERC Has No Authority, And Will Unduly Disrupt And Complicate The Determination Of Breach Of Contract Damages In The Courts

The court of appeals held that issues of breach of contract and the damages therefor have been confirmed in this case to be within the jurisdiction of the courts. App 11a; 202 F.3d at 400. However, the court's inconsistent approval of NEP's CTC relating to Norwood establishes an irreconcilable conflict with the jurisdiction of those courts to adjudicate the cases before them.

The court appears to agree that FERC has no legal authority to determine damages for a breach of contract. Nothing in the FPA grants any such authority to the Commission and its exercise would be inconsistent with the principles of the *Mobile-Sierra* doctrine, *infra* at 18-21, requiring that the contract agreement between the parties is binding on the Commission in the absence of some overriding public interest showing, which admittedly FERC has not done in the present case.

The problem arises because the CTC is essentially indistinguishable from contract damages. Since the court concedes that NEP's CTC relating to Norwood has the appearance of contract damages, this poses the issue as to whether it governs the courts in resolving the breach of contract issues within their sole jurisdiction. If so, the CTC clearly exceeds FERC's jurisdiction under the FPA. If it does not bind the courts, as the court of appeals opinion appears to infer, this important issue of which jurisdiction has controlling power to

adjudicate contract damages which need to be resolved in the interest of determining the proper jurisdiction of the courts *vis a vis* FERC.

In raising, but not resolving this issue, the court of appeals has demonstrated a fatal deficiency in the Commission's order approving NEP's CTC relating to Norwood. The court holds that FERC:

> . . . has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power.

App. 11a; 202 F.3d at 400. Without such a determination, the setting of amounts to be paid under the contract by the CTC exceeds the Commission's authority under Sections 205 or 212 of the FPA because it does not meet the requirements of Section 5 of the Administrative Procedure Act precluding arbitrary and capricious adjudication. App. 125a; 5 U.S.C. §706(2)(A).

The CTC cannot be based on reasoned decisionmaking when the FERC admitted it has made no review or analysis of the contract issues relating to the contract involved.

III. The Court Of Appeals Erred In Not Rejecting NEP's Stranded Cost Filing (CTC) Relating To Norwood As Conflicting With This Court's Long-Established *Mobile-Sierra* Doctrine

The FERC, in its order of February 25, 1998, App. 44a; 82 FERC ¶61,179, 61,660 (1998) approved NEP's divestiture

to USGen/PG&E of its jurisdictional power facilities (which did not include its generator), and its termination of Tariff 1 service to its distribution affiliates [8] and, at NEP's request, converted Norwood's service under its Power Contract from a cost-of-service based rate to fixed-rate contract. NEP subsequently filed its stranded cost CTC relating to Norwood, which the Commission approved in an order issued May 15, 1998. App. 103a; 83 FERC ¶61,174, (1998). Both of these orders conflicted with the Power Contract between Norwood and NEP approved by the antitrust Decree and Order of April 12, 1983.

Article 1 of the Power Contract provided that: "Under the terms and conditions specified in this Contract, NEP agrees to provide all-requirements electric service to Norwood under NEP's FERC Tariff. . . ." That tariff was specifically defined in Articles II(c) and IXB of the Power Contract as those terms of "the FERC Electric Tariff, Original Volume No. 1 of New England Power Company, filed with FERC, not in conflict with any terms of the Power Contract." The meaning of that tariff, as filed with the FERC and in effect from the date of the contract up until FERC's approval of NEP's divestiture and termination of Tariff 1 service to its affiliates in its order of February 25, 1998, was that it was a cost-of-service regulated rate. The Commission's action in that order to convert Norwood from a cost-of-service based rate to a fixed price rate clearly conflicted with the plain language of the Power Contract. In addition, NEP's subsequent filing of a stranded cost CTC designed to require Norwood to make payments for NEP to up to $78 million, even though NEP stopped providing all-requirements electric service to Norwood under NEP's FERC tariff, also conflicted with the 1983 Power Contract.

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[8] NEP's affiliates, including Mass. Electric and Narragansett, took 97 percent of NEP's Tariff 1 service.

Norwood's new FERC-ordered fixed-rate is indistinguishable from the fixed-rate contracts held by this Court to preclude any unilateral charge filed by the utility under the FPA during their term. *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 322 (1956). The court of appeals below agreed that these cases establishing the *Sierra-Mobile* doctrine "prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest", and that "the addition of the express option to terminate earlier (at a specified price) can be viewed as modifying the contract." App. 12a; 202 F.3d at 400. However, the court erroneously declined to apply the *Sierra-Mobile* doctrine on the ground that the CTC was, in essence, only applying a liquidated damage clause to the contract:

> . . . The termination charge is certainly a detriment but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract.

Id.

But this turns the *Sierra-Mobile* doctrine upside down. The Power Contract contained no authorization for Norwood to make any payments to NEP when NEP was not delivering power, and included no liquidated damages clause that would apply in the event either party breached the contract. The court improperly authorizes NEP to unilaterally insert such a clause that conflicts with the Power Contract authorizing only payment for actual power service delivered by NEP. This is confirmed by Article IXB of the Power Contract stating that, "in the event of any conflict between the provisions of this Contract and the

provisions of NEP's FERC Tariff, the provisions of this Contract shall control."

Thus, the court of appeals' decision that NEP can unilaterally add a provision to the contract that, "merely spells out what would have been the law's remedy if Norwood had no option but simply breached the contract"(*i.e.*, the imposition of a liquidated damages clause), since contrary to the language of the Contract requiring Norwood to only pay for power service provided by NEP, wholly misapplies this Court's *Mobile-Sierra* doctrine.

IV. NEP's CTC Should Have Been Rejected As An Unlawful Retroactive Rate Under This Court's Decision In *Arkansas-Louisiana Gas Co. v. Hall* And For Failing To Meet FERC Regulations For New Rate Filings

NEP's stranded cost filing violates the filed rate doctrine because it changed NEP's Tariff 1 retroactively after Norwood's service ended. After NEP's divestiture, termination of Tariff 1 service to its affiliates, and conversion of Norwood's cost of service rate to a fixed price rate approved by the Commission's order of February 25, 1998, Norwood notified NEP on March 3, 1998 that it was shifting to a new power supplier effective April 1, 1998. Norwood's new contract with Northeast Utilities was filed with the FERC and unconditionally approved by it on April 22, 1998. This became the new filed rate for Norwood. NEP never requested rehearing or contested this order.

This Court in *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) held that: ". . . The Commission may not impose a retroactive rate alteration and, in particular, may not

order reparations, *see, e.g., FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968). . ." This rule has been followed by a number of circuits. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987); *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) ("The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, . . . Providing the necessary predictability is the whole purpose of the well-established "filed rate" doctrine which forbids a regulated utility to charge rates for its services other than those properly filed with the appropriate regulatory authority"); *Town of Concord v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1991).

The court of appeals below improperly sought to distinguish these precedents on the ground that the "tariff change gives Norwood an option it did not have before to cancel future purchases on short notice by paying a termination charge – hardly a retroactive increase in charges for past purchases," App. 13a; 202 F.3d at 400-401 (emphasis in original), but this directly conflicts with the timing of NEP's CTC filing. This is completely inaccurate as Norwood had departed NEP with FERC's approval given on April 22, 1998, long before FERC's approval of NEP's CTC given on May 15, 1998. Thus, Norwood had no option available to it at the time the new contract was entered into with Northeast Utilities. In addition, NEP and the court characterized NEP's CTC as a "stranded cost recovery in the tariff."[9] Hence, the CTC, in fact, seeks to charge Norwood for prior costs incurred by NEP which it now alleges have been stranded. These costs are not new costs for the future but old prior costs which have not been collected. This was also admitted by the court below when it described NEP's CTC:

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[9] App. 11a; 202 F.3d at 400; *see also, supra*, at 15.

> . . . It is a formula-driven charge to recover certain projected losses to New England Power caused by not supplying electricity and preparing to do so, . . .

App. 13a; 202 F.3d at 401 (emphasis added). Thus, the facts are clear that NEP's CTC filing seeks to recover prior incurred costs by NEP which that company claims it incurred because of its own voluntary and unrequested decision to depart from the electric generation business, [10] which it had not legally been authorized to collect up to the point of its departure from the business.

Since NEP's rates on file at the time Norwood entered its new service agreement on March 4, 1998 did not provide Norwood the legal notice necessary under the filed rate doctrine to the effect that Norwood would be subject to those charges, the court of appeals erred in accepting NEP's proposed amendment which violated the filed rate doctrine and the ban against retroactive changes in the rates on file with the Commission.

Conversely, if the court of appeals was somehow correct that the CTC was a "future" rate applicable to Norwood, the court then erred in not requiring NEP to follow the FERC's regulations governing any new rates under Sections 212 or 205 of the FPA in 18 C.F.R. § 35.13.

NEP's CTC sought to impose on Norwood a flat charge of $7,388,083 per year, or a total of over $78 million for power not delivered.

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[10] *See* fn.2, *supra at 3-4.*

The Commission's regulations in 18 C.F.R. §35.13(a) require "every public utility shall file the information required by this section . . . at the time it files . . . all or part of a rate schedule to supersede, supplement, or otherwise change the provisions of a rate schedule filed by the Commission under §35.1"(emphasis added). This requires a detailed cost-of-service analysis of the new changed rate, which admittedly, NEP never filed. Under established Commission precedents, the failure to comply with the requirements of §35.13 of the Commission's regulations should have been summarily rejected by the Commission. *Southern California Edison Co. v. FERC*, 686 F.2d 43, 46-47 (D.C. Cir. 1982); *Consumer Power Co.*, 47 FERC ¶61,283 (1988), *reh'g denied*, 48 FERC ¶61,113 (1989).[11]

V. The Court Of Appeals Erred In Sustaining The FERC's Orders Refusing To Address The Merits Of Holding A Hearing On Norwood's Claims That NEP's CTC Relating To Norwood And NEP's Denial Of Standard Offer Wholesale Service Constituted Undue Discrimination In Violation Of Sections 212 and 205(b) Of The FPA

Both the FERC and the court of appeals conceded that NEP's CTC relating to Norwood was twice as high as the CTC NEP had agreed to enter with its distribution company affiliates, Mass. Electric and Narragansett. App. 15a; 202 F.3d at 401-402. Norwood timely filed affidavits by expert witnesses in the

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[11] The court's reference in a footnote to 18 C.F.R. §35.13(a)(2)(iii) is not relevant and NEP did not meet those requirements.

FERC proceedings establishing these facts, but the matters were never discussed on the merits by the Commission in its orders below and the FERC denied any hearing on the issues. [12]

In the first case before the Commission, Norwood presented evidence through its expert, Robert G. Towers, that the stranded cost charges under the CTC agreed to by NEP with its affiliates, Mass. Electric and Narragansett, would result in the payment of stranded costs of $1.626 billion in excess of those authorized by the Commission under Order 888. Norwood also submitted the affidavit of Dr. John W. Wilson concluding that the agreement between NEP and USGen to fix prices at which USGen would sell back wholesale electric power to NEP's affiliates, would escalate by 60 percent over the seven year period 1998 to 2004 and would distort the competitive market prices. This would directly harm Norwood and would "effectively foreclose Norwood from potential competitive wholesale power market and destroy Norwood's ability to provide its own retail customers with alternative, competitive supply options." The Commission refused to hold a hearing in either case (dealing with NEP's divestiture filing under Section 203 of the FPA), despite extensive affidavits presented by Norwood.

In the third case before the Commission dealing with NEP's CTC filing relating to Norwood, the Commission again accepted NEP's filing without suspension or hearing, and

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[12] The court of appeals cite to a ruling by the administrative law judge in the first of the three dockets before FERC (ER97-678-000) is completely irrelevant because it was in the early stage of the proceeding and Norwood legally submitted affidavits based on the subsequent contract entered by NEP with USGen transferring the standard offer service to that company, which were accepted by the Commission. App. 29a, 30a-31a; 81 FERC ¶61,281, 62,371 (1997).

offered no analysis of Norwood's expert affidavits which established that the CTC to Norwood was twice as high, nor did it offer analysis on the issue of discrimination extensively argued by Norwood in its pleadings. The Commission made no evaluation of the matter on the merits other than to state that, "unlike the CTC approved in the tariff amendment, the CTC's approved in the settlement proceeding was a product of negotiated settlement," citing *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984), *cert. denied* 469 U.S. 915. The court of appeals affirmed this as a basis for FERC's refusal to even discuss or consider the discrimination claims raised by Norwood in its affidavits. However, *Cities of Bethany* does not justify the FERC's conduct as sustained by the court of appeals in the present case for a number of reasons.

First, the FERC allowed contesting parties a hearing before a presiding administrative law judge in which all of the parties participated and the full merits of all of the factual issues were fairly investigated. 727 F.2d at 1134-5.

Second, Norwood here has alleged anticompetitive effects based on having a CTC twice as high as NEP's CTC to its affiliates, as well as denial of standard offer service. The court in *Cities of Bethany* agreed that such allegations would require the Commission to consider such claims. 727 F.2d at 1140-1141.

In the present case, Norwood did allege and present expert affidavits to the FERC that the difference in the CTC charge by Norwood in relationship to its much lower CTC charges to its affiliates, and the below market standard offer fixed prices denied to Norwood, are designed to give NEP's affiliates a competitive advantage over Norwood in a retail market in which both Norwood and NEP's affiliates compete for retail customers.

Thus, Norwood properly presented its material issues of fact through expert affidavits to the FERC which did not rule that those issues were not presented, but deemed them irrelevant.

Since the court below now agrees that the evidence is relevant, App. 16a; 202 F.3d at 402, the proper remedy is a remand to require FERC to address those factual issues under the anti-discrimination sections of the FPA.

Under long-standing FERC practice and procedure, the raising of issues of material fact is alone sufficient to require FERC to undertake procedures for their adjudication. Here, Norwood did more, by voluntarily submitting expert affidavits establishing the genuine issues of fact. The Commission never stated that Norwood had not raised disputed genuine issues of material fact on the present issues, but simply ruled that those facts were irrelevant based on its rulings. The court of appeals has ruled that the discrimination issues are relevant. The FERC has never considered these matters on their merits, ordered any paper hearing proceedings or any proceeding, nor did it consider on their merits these factual contentions, which it summarily dismissed. The court of appeals improperly treated the matter as though those full hearings had taken place.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 30, 2000

No. 98-1847, No. 98-1876, No. 98-2072
TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 98-2198, No. 98-2199

NORTHEAST CENTER FOR SOCIAL ISSUES STUDIES,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 98-1847, No. 98-1876, No. 98-2072,
No. 98-2198, No. 98-2199

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

202 F.3d 392; 2000 U.S. App. LEXIS 1561

February 2, 2000, Decided

PRIOR HISTORY:

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL REGULATORY COMMISSION.

DISPOSITION: Petitions for review denied.

CORE TERMS: termination, wholesale, customer, tariff, affiliates, regulation, settlement, supplier, retail, stranded, transmission, public interest, electricity, generating, electric

power, license, environmental, terminate, Federal Power Act, environmental impact statement, competitive, anticompetitive, hydroelectric, undue preference, generation, wheeling, notice, plant, energy, cost-of-service

COUNSEL: Charles F. Wheatley, Jr. with whom Wheatley & Ranquist, Kenneth M. Barna, Alan K. Posner and Rubin & Rudman were on consolidated brief for petitioner Town of Norwood, Massachusetts.

Richard Roos-Collins, Natural Heritage Institute, for petitioner Northeast Center for Social Issue Studies.

Larry D. Gasteiger with whom Douglas W. Smith, General Counsel, Jay L. Witkin, Solicitor, and John H. Conway, Deputy Solicitor, Federal Energy Regulatory Commission, were on consolidated brief for respondent.

Edward Berlin with whom Robert V. Zener, Swidler Berlin Shereff Friedman, LLP, William J. Madden, John A. Whittaker and Winston & Strawn were on brief for intervenor New England Power Company.

Zori G. Ferkin with whom Earle H. O'Donnell, Andrew B. Young, Donald W. Stever and Dewey Ballantine LLP were on brief for intervenor USGen New England, Inc.

JUDGES: Before Boudin, Stahl and Lipez, Circuit Judges.

OPINION BY: BOUDIN

OPINION: BOUDIN, Circuit Judge. In this case, the Town of Norwood, Massachusetts ("Norwood") and the Northeast Center for Social Issue Studies ("Northeast Center") seek review of a series of orders of the Federal Energy Regulatory Commission ("FERC") directed inter alia to New England Power Company

("New England Power"), which engages in interstate wholesale electric power distribution in New England. In a companion decision *Town of Norwood v. New England Power Company, 2000 U.S. App. LEXIS 1560,* No. 99-1047, we decide today a separate appeal by Norwood from the dismissal of an antitrust and breach of contract suit that it brought in the district court against New England Power and others.

I THE HISTORY

Our history of this case is drawn primarily from the administrative record. For many years New England Power served as one of the major wholesalers of electric power in New England. It operates a high voltage transmission network, and in the past has owned and operated a number of generating plants, including hydroelectric, fossil, and nuclear. New England Power is a subsidiary of New England Electric System, which also owns four "retail" distribution companies, including Massachusetts Electric Company ("Mass Electric") serving Massachusetts, and Narragansett Electric Company ("Narragansett") serving Rhode Island.

New England Power sells wholesale power that it generates or buys from others both to affiliates like Mass Electric and to non-affiliated wholesale customers like Norwood, which operates its own municipal electric system serving businesses and residents in the Town of Norwood, Massachusetts. In general, wholesale sales in interstate commerce are subject to regulation by FERC under the Federal Power Act, *16 U.S.C. §§ 791a*-828c, see *16 U.S.C. § 824*(a), while retail rates (e.g., those charged by Mass Electric to its business and residential customers) are subject to state regulation, e.g., Mass. Gen. Laws ch. 164, §§ 93-94E; see also *Boston Edison Co. v. City of Boston, 390 Mass. 772, 459 N.E.2d 1231, 1233 (Mass. 1984).*

Traditionally, at both the federal and state level, electricity sales have been regulated on the familiar public utility model: the rates have been set forth in filed tariffs, unreasonable or unduly discriminatory rates have been forbidden, and an administrative agency has been charged with overseeing rates and other related subjects (such as extension of lines, mergers, and the like). See generally *Town of Concord v. Boston Edison Co., 915 F.2d 17, 20 (1990)*, cert. denied, *499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991)*. In many cases, as with New England Power, the suppliers are vertically integrated and are engaged in electricity generation, intercity transmission, and local distribution. See *id. at 19.*

As with other, once fully regulated industries, legislators and regulators have over the last 25 years sought to introduce a greater measure of competition into the electric power industry. In the case of electric power, this has been achieved not by encouraging duplication of intercity transmission or local distribution networks--as is occurring in the telephone industry--but primarily by regulatory changes. These include imposing obligations on facilities' owners to carry power for other suppliers ("wheeling"), encouraging customers to choose among competing suppliers, and discouraging anticompetitive practices by a variety of means, including restructuring so as to reduce the incentives for anticompetitive behavior. See generally Energy Information Administration, U.S. Dep't of Energy, The Chancing Structure of the Electric Power Industry: Selected Issues, 1998, DOE/EIA-0562(98) (1998). Both Massachusetts and Rhode Island have been seeking to foster retail competition in the supply of electricity.

To this end, in December 1996, New England Power filed with FERC proposed amendments to power sales agreements with Mass Electric and Narragansett. Prior to the filing, requirements contracts obligated New England Power to supply its affiliates with all of their needs for electric power; the

wholesale rates were specified in tariff schedules and termination by either side required lengthy prior notice (e.g. seven years). The proposed amendments permitted the affiliates to terminate on short notice, but subject to paying as a termination charge a portion of the costs incurred by New England Power in preparing itself to meet their projected longer-term requirements.

FERC referred the new filings to an administrative law judge, *New England Power Co., 78 F.E.R.C. P61,080 (1997),* under whose auspices settlement discussions occurred. See *New England Power Co., 80 F.E.R.C. P63,003 (1997).* In May 1997, New England Power filed proposed settlement agreements, which again permitted early termination for its affiliates (subject to termination charges), and provided that after termination New England Power would provide Mass Electric and Narragansett (at their option) with new "wholesale standard offer rates" which are described below. The settlement also committed New England Power to file a plan with FERC, by October 1, 1997, to divest itself of most of its generation business. Both of these steps, more fully described below, were purportedly designed to foster competition.

On October 1, 1997, New England Power sought approval from FERC to sell practically all of its non-nuclear electrical generating plants to USGen New England, Inc. ("USGenNE"), a subsidiary of a major west coast public utility holding company ("PG&E"). The sale required FERC approval both for the sale of certain facilities and the transfer of hydroelectric licenses. *16 U.S.C. §§ 801,* 824b. In connection with its proposed purchase of assets, USGenNE agreed to assume responsibility for providing wholesale standard offer service to Mass Electric and Narragansett, and New England Power proposed to implement a rate freeze that would prevent increases in rates for its remaining wholesale customers, including Norwood.

Since 1983, Norwood has purchased electricity at wholesale from New England Power and resold it to local businesses and residential customers. Its agreement with New England Power, as extended by Norwood, obligated Norwood to take its requirements from New England Power through

October 31, 2008. [1] Regarding the wholesale standard offer rates proposed for New England Power affiliates as an unfair advantage to retail "competitors," Norwood notified New England Power on March 4, 1998, that it was switching to a different wholesale supplier. Norwood has now become a wholesale customer of Northeast Utilities, another major supplier of wholesale electricity in New England.

New England Power countered on March 18, 1998, by filing a proposed tariff revision that would permit its remaining wholesale customers to terminate their long-term requirements contracts on 30 days' notice. But the tariff purported to subject such customers to payment of a contract termination charge to permit New England Power to recover the revenues that it would have collected had the customers continued to pay the fixed tariff rate through the contract term, less the expected costs

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[1] In April 1998, Norwood petitioned FERC for a declaratory order determining that the contract was not in fact extended to October 2008 because, inter alia, New England Power did not file with FERC an amendment reflecting the extension. FERC denied the petition, *Town of Norwood, 87 F.E.R.C. P61,341 (1999)*, but now urges us to avoid piecemeal litigation by dismissing or staying this appeal pending possible rehearing of the latest order. But there is little overlap between that order (regarding the expiration date of Norwood's contract) and the instant petitions (primarily concerning the lawfulness of the contract termination charge). And even if on rehearing FERC found in favor of Norwood, the termination charge controversy would remain a live issue, as to the period after Norwood stopped receiving electricity from New England Power (April 1, 1998) but before the requirements contract expired (October 31, 1998, according to Norwood's no-extension theory).

avoided by not providing service. New England Power subsequently billed Norwood for a portion of this termination charge but Norwood apparently has declined to pay.

In the proceedings before FERC, Norwood objected to each of the three measures proposed by New England Power: (1) its proposed settlement with its affiliates to terminate their requirements contracts and to provide them the option of wholesale standard offer rate service; (2) its proposed divestiture of generating facilities to USGenNE and the associated freeze on the wholesale rates New England Power charged to its unaffiliated wholesale customers; and (3) its March 1998 tariff amendments allowing unaffiliated wholesale customers like Norwood to terminate their requirements contracts on short notice but only on payment of a contract termination charge.

In a set of orders in these three proceedings issued between November 1997 and June 1998, FERC rejected virtually all of Norwood's requests for relief. [2] Among other things, FERC approved the settlement agreement; it approved the sale of non-nuclear generating facilities to USGenNE and the transfer of hydroelectric licenses to it; and it upheld New England Power's imposition of a contract termination charge on unaffiliated purchasers who sought to terminate their existing contracts prematurely. Norwood sought direct review in this court, *16 U.S.C. § 8251*(b), and we have consolidated its appeals into the present case.

Separate petitions for review of the FERC orders were filed in this court by Northeast Center. Its petitions challenged

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[2] *New England Power Co., 83 F.E.R.C. P61,174 (1998),* reh'g denied, *84 F.E.R.C. P61,175 (1998); New England Power Co., 82 F.E.R.C. P61,179 (1998),* reh'g denied, *83 F.E.R.C. P61,275 (1998); New England Power Co., 81 F.E.R.C. P61,281 (1997),* reh'g denied, *83 F.E.R.C. P61,265 (1998).*

the orders insofar as they approved the sale to USGenNE of New England Power's hydroelectric generating facilities and associated licenses. Northeast Center challenged these actions on the ground that FERC had violated the Federal Power Act by failing to consider whether the divestiture *would reduce* property tax revenues of adjacent communities, and that FERC had violated both that statute and environmental laws by failing to give adequate attention to the potential environmental impact of the transfers. This court consolidated these petitions for review with those of Norwood.

I. DISCUSSION

1. Norwood's main attack, but not its only one, is upon FERC's approval of the contract termination charge that the New England Power tariff amendment of March 18, 1998, imposes on unaffiliated wholesale customers; this charge, as already explained, applies to a requirements contract customer who chooses to end its purchases before the end of the contract term and without the required notice. The amendment provides the customer an option to terminate at short notice but sets a specific tariff-based price on early departure.

FERC is entitled to review tariff amendments governing wholesale power sales under a "just and reasonable" standard, *16 U.S.C. § 824d*(a); and at least on the surface the amendment serves the Commission's goal of fostering competition by giving Norwood an option to enter immediately into competitive purchasing. But Norwood argues that FERC's action is unlawful for a number of independent reasons, which we next address.

First, Norwood says that the approval is inconsistent with the Commission's "stranded cost recovery" provisions adopted

in FERC Order No. 888 and associated regulations. [3] Order No. 888 imposed on investor-owned power companies a general obligation to wheel power for customers, many of whom had previously bought their power from one transmission company--*normally, an integrated supplier--but now wished to use that* company merely to transport power bought from another company. The order conditioned this wheeling obligation on the customers contributing to the recovery of the so-called "stranded costs" of the transporting company.

Stranded costs were defined in detail by FERC formulas but the general concept was this: in providing "bundled" service (generation and transmission), power companies had made investments expecting to recover them from captive customers. The wheeling obligation imposed by Order No. 888 could permit such customers to reach cheaper power elsewhere; and in some cases this would leave the power companies with investments, especially in generation facilities, that could not be fully recovered in a competitive environment. Stranded cost recovery to protect reasonable expectations was FERC's quid pro quo for open access to competing electricity suppliers during this period of transition.

The stranded cost recovery for which the orders and regulations provided was framed as an obligation of those

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[3] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, *61 Fed. Reg. 21540 (1996)* (rule codified as revised at 18 C.F.R. pts. 35 & 385), clarified, *76 F.E.R.C. P61,009 (1996), 76 F.E.R.C. P61,347 (1996)* and *79 F.E.R.C. 61,182 (1997)*, order on reh'g, Order No. 888-A, *62 Fed. Reg. 12274 (1997)*, order on reh'g, *Order No. 888-B, 81 F.E.R.C. P61,248 (1997)*, order on reh'g, *Order No. 888-C, 82 F.E.R.C. P61,046 (1998)*, petitions for review pending sub non. Transmission Access Policy Study Group v. FERC, Nos. 97-1715, et al. (D.C. Cir. Mar. 30, 1998).

customers who had previously been power customers of the integrated supplier but now chose to use only its transmission system. See 18 C.F.R. § 35.26(b)(1), (c)(2) (1999). Norwood's first objection to the contract termination charge in this case is that although Norwood previously bought power from New England Power, it got its transmission service for such power from Boston Edison and does not intend to use New England Power transmission service in the future. Thus, says Norwood, it falls outside the scope of FERC's stranded cost regulation and the tariff is inconsistent with Order No. 888.

FERC concedes that its Order No. 888 regulations do not apply in this case. But, as FERC notes, there is a separate (although parallel) justification for stranded cost recovery in the present case: Norwood as a requirements-contract customer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. *New England Power Co., 83 F.E.R.C. P61,174, at 61,722-23 (1998).* In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. See Order No. 888, *61 Fed. Reg. at 21662* (reserving the possibility of stranded cost recovery in other situations).

Norwood also argues that Order No. 888 and FERC's regulations excluded from stranded cost recovery those cases where a requirements contract was entered into or extended after July 11, 1994. FERC's stated reason for this limitation was that on that date it first gave public notice of its stranded cost proposal; thereafter, for new contracts the supplier and purchaser could make their own arrangements for early termination, recovery, and the like. Order No. 888, *61 Fed. Reg. at 21641;* see also 18 C.F.R. § 35.26(b) (7), (c)(1)(ii). Norwood says that while its original contract was made prior to July 11, 1994, New England Power and Norwood agreed to changes in the agreement after that date. But the restrictions in Order No. 888

are no more than conditions on stranded cost recovery under that order and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation.

Second, Norwood claims that the tariffed termination charge is nothing more than an effort to collect contract damages for early termination through the Commission's processes, and that this conflicts with FERC's practice of deferring to the courts on matters of contract and deprives Norwood of the chance to counter a contract breach claim by showing that New England Power breached the contract first. Admittedly, the stranded cost recovery in the tariff is closely akin to contract damages, and the Commission in the past has declined to adjudicate some contract disputes. E.g., *Southern Cal. Edison Co., 85 F.E.R.C. P61,023 (1998).*

But FERC's abstention in cases like Southern California Edison appears primarily to reflect an unwillingness to resolve disputes about the meaning of disputed contract provisions. Here, the Commission has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power. See *New England Power Co., 84 F.E.R.C. P61,175, at 61,920 (1998).* It has merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations.

Third, Norwood claims that FERC had to reject the New England Power tariff offering customers the termination option because it conflicts with the Mobile-Sierra doctrine and the filed rate doctrine. The former, developed in cases interpreting the Federal Power Act and the Natural Gas Act, *Federal Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 354-55, 100 L. Ed. 388, 76 S. Ct. 368 (1956); United Gas Pipe Line Co. v.*

Mobile Gas Serv. Corp., 350 U.S. 332, 344, 100 L. Ed. 373, 76 S. Ct. 373 (1956), prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest. See *Texaco, Inc. v. FERC, 331 U.S. App. D.C. 237, 148 F.3d 1091, 1095-97 (D.C. Cir. 1998)*. The doctrine protects a party's interest in its contract (unless overridden by a public interest finding).

In a sense, the addition of the express option to terminate earlier (at a specified price) can be viewed as modifying the contract. But from Norwood's vantage, the option merely gives it something that it did not have before; it remained free to insist that New England Power continue to supply power under the contract until expiration. The termination charge is certainly a detriment but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract.

The filed rate doctrine can--so far as relevant here--be regarded as a prohibition on retroactive increases for tariffed services. See *Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577-78, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)*. Formally, the filed rate doctrine says that the only lawful rate is that reflected in the tariff on file when the service is performed, id., but the refusal to permit retroactive increases is taken as a corollary, *id. at 578*. [4] Most regulatory statutes, but not all, see *Federal Power Comm'n*

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[4] Although the doctrine originated as a bar to shipper efforts to pay something less than the tariff rate, see, e.g., *Texas & Pac. Ry. Co. v. Mugg & Dryden, 202 U.S. 242, 50 L. Ed. 1011, 26 S. Ct. 628 (1906)*, it has evolved, see, e.g., *Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, into a much broader limitation on civil lawsuits that have the effect of contradicting or undercutting a tariffed rate regulated by a federal agency, see, e.g., *Arkansas La. Gas, 453 U.S. 571, 69 L. Ed. 2d 856, 101 S. Ct. 2925*. This latter development is considered in our companion decision.

v. Sunray DX Oil Co., 391 U.S. 9, 24, 20 L. Ed. 2d 388, 88 S. Ct. 1526 (1968), permit reparations to the customer if the tariff rate is later shown to be unreasonably high, but the carrier can never collect more than the tariffed rate.

Norwood is not being asked to pay more for past purchases than provided for by the tariff in effect at the time of such purchases. The tariff change, as just noted, gives Norwood an option it did not have before to cancel future purchases on short notice by paying a termination charge--hardly a retroactive increase in charges for past purchases. Norwood says that the change is retroactive because it was imposed after Norwood had ceased to make purchases under FERC Tariff No. 1, Norwood having disclaimed its existing contract and signed on with a new supplier. But the change only governed Norwood as to its future purchases--or failures to purchase--from New England Power; there was no effort to increase rates for purchases made in the past, which is the pertinent concern of the filed rate doctrine.

Fourth, Norwood says that New England Power has failed to supply data to show that it is "just and reasonable" to require Norwood to pay a contract termination charge allegedly amounting to $78 million for the period from 1998 through 2008. Norwood derives this figure by projecting the termination charges from April 1, 1998, through the expiration of the extended contract which Norwood has now disavowed. The Federal Power Act requires just and reasonable rates, *16 U.S.C. § 824d*(a), and the regulations for rate filings generally require the filing of cost of service data for new or increased rates, 18 C.F.R. §§ 35.12, 35.13.

But the termination charge is not a new or increased rate for supplying energy. It is a formula-driven charge to cover certain projected losses to New England Power caused by not supplying electricity after preparing to do so, calculated based on rates already approved by FERC. Thus the contract termination

charge in no way represents a rate increase for Norwood. [5] If these charges were miscomputed or unsupported, Norwood might well have a legitimate objection; but it has not explained any such objection to us, let alone tried to support it with citations or figures.

Before FERC, Norwood primarily urged that the contract termination charge filing be rejected in its entirety. But in a footnote in its motion to intervene, and more fully in its motion for rehearing, Norwood also sought a hearing regarding the reasonableness of the amount that New England Power sought to recover--referring, inter alia, to alleged problems with the contract termination charge calculation. FERC denied the request for rehearing, concluding that no evidentiary hearing was necessary because no party had raised a disputed issue of material fact. *New England Power Co., 84 F.E.R.C. P61,175, at 61,920 (1998).*

To whatever extent there was in fact a disputed issue regarding the termination charge calculation that necessitated a hearing, cf. *Louisiana Energy & Power Auth. v. FERC 141 F.3d 364, 371 (D.C. Cir. 1998),* Norwood does not identify it to us. FERC suggested in its initial order that Norwood could file a section 206 complaint, *16 U.S.C. § 824e,* challenging the substance of the contract termination charge, *New England Power Co., 83 F.E.R.C. P61,174, at 61,724 (1998),* and presumably it can still do so, cf. *Oxy USA, Inc. v. FERC, 314*

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[5] New England Power filed its proposed tariff amendment under FERC's abbreviated filing provision, 18 C.F.R. § 35.13, which exempts certain rate schedule changes from typical cost-of-service filing requirements. In particular, 18 C.F.R. § 35.13(a)(2)(iii) provides for abbreviated filing for "a rate schedule change that does not provide for a rate increase" in certain circumstances. FERC held that the filing was proper "because payment of the CTC will not result in a rate increase over the existing Tariff No. 1 rates." *New England Power Co., 84 F.E.R.C. P61,175, at 61,920 (1998)*

U.S. App. D.C. 175, 64 F.3d 679, 690 (D.C. Cir. 1995).

Fifth, Norwood's final set of objections to the termination charge are of a different character. In substance, Norwood complains that the termination charge imposed on it exceeds the charge imposed on affiliates of New England Power; that the so-called wholesale standard offer rate (available to the affiliates but not to Norwood) is unfairly low during the opening years and dangerously high thereafter; and that these discrepancies, and the threatened effects, require rejection of both the termination charge and the standard offer rates--or at least evidentiary hearings.

The Commission's answer regarding the contract termination charge--that the affiliates "settled" with New England Power, *New England Power Co., 83 F.E.R.C. P61,174, at 61,723 n.13 (1998),* reh'g denied, *84 F.E.R.C. P61,175, at 61,920 (1998)*--would make the hairs stand up on the neck of an old-fashioned utility lawyer. The utility tradition, growing out of hostility to preferences and rebates, has been to oppose unequal treatment or at least to treat it with great skepticism. Specifically, the Federal Power Act outlaws unjustifiably disparate treatment of similarly situated entities under the rubric of "undue preference." *16 U.S.C. § 824d*(b).

But differential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts). E.g., *Cities of Newark v. FERC, 763 F.2d 533, 546 (3d Cir. 1985).* The District of Columbia Circuit, which reviews more such regulatory matters than any other court, has approved divergent treatment that stems from a settlement, reasoning that there is a public interest in settlements and that one party should not be able to frustrate a settlement for ever one else. *Cities of Bethany v. FERC, 234 U.S. App. D.C. 32, 727 F.2d 1131, 1138-40* (D.C. Cir.), cert. denied, *469 U.S. 917*

(1984); United Mun. Distribs. Group v. FERC, 235 U.S. App. D.C. 316, 732 F.2d 202, 212-13 (D.C. Cir. 1984).

Norwood attacks this justification for differential treatment on the ground that it should not apply where the non-settling parties were denied an opportunity to attack the settlement in the administrative proceeding. However, even assuming that such a limitation exists (and perhaps it should), the Administrative Law Judge found that Norwood's request for a hearing on the settlement was out of time and unsupported, *New England Power Co., 80 F.E.R.C. P63,003, at 65,040-41 (1997),* and Norwood offers no answer to this ruling.

Under these circumstances, we think that the mere disparity in Norwood's contract termination charge vis a vis that of other companies that settled is not a per se violation of the "undue preference" prohibition. Norwood passed up the opportunity to settle with New England Power regarding termination, see New *England Power Co., 83 F.E.R.C. P61,174, at 61,723 n.13 (1998),* and argued to FERC that the contract termination charge approved in the settlement proceeding was too high. It seems to us that at least where a party has been offered the same settlement and refused it, a claim based simply on an abstract right to be treated the same as settling companies has much less force--and to recognize it would subvert the public interest in promoting settlements. [6] Whether an undue

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[6] As it happens, New England Power does trouble in its brief to explain why it computed a different contract termination charge for Norwood. It says that in the settlement (the termination provisions of which it offered to Norwood) the formula was based on a theory that--unlike the charge in the latter tariff--involved projecting and allocating an overall loss to New England Power from the transition (with offsetting credits for benefits). Since the projection was based on disputable estimates, the company based its tariff on the more readily calculable figures relating to estimated purchases under the contract less estimated avoided costs.

preference claim might be made based on competitive or other market impacts is a different issue, addressed below.

2. Norwood's more interesting claim of undue preference is directed not to the contract termination option and charge--Norwood's main target--but to the wholesale standard offer rates, which appears to have been offered only to affiliates of New England Power. These rates were not offered to Norwood; and although they were initially included in the FERC settlement, they do not appear to be a resolution of any existing legal obligation between New England Power and its affiliates. Their origin and justification are quite different.

The wholesale standard offer rates, it appears, are a schedule of wholesale power rates that begins at a rather low level and then climbs over a number of years to a rather high level. [7] It interlocks with schedules of retail standard offer rates that New England Power's affiliates have agreed, in settlements with their respective state commissions, to offer as a safeguard for retail customers who do not or cannot immediately take advantage of the competitive sources of retail supply that both federal and state regulators foresee developing. See *New England Power Co., 82 F.E.R.C. P61,179, at 61,664 (1998);* In re Massachusetts Elec. Co., Mass. D.P.U. 96-25, at 23-25 (Feb. 26, 1997). To the extent that customers take advantage of these initially favorable retail rates from the affiliates, the retailers themselves will have counterpart wholesale rates.

These "backup" standard offer rates are not intended as a permanent low-cost option. On the contrary, they increase sharply over a brief period partly in order to encourage

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[7] For example, the rate goes from 3.2 cents per kilowatt hour to 5.1 cents per kilowatt hour between 1998 and 2004. Norwood claims that the early-year prices are below-market, but whether that is so is unclear from the record.

customers to migrate into the competitive market once they have had time to negotiate with retailers who, because of wheeling obligations imposed at both the wholesale and retail level, will then be able to compete to supply once-captive customers. See In re Massachusetts Elec. Co., Mass. D.P.U., at 23-25. But Norwood, being a municipal system, is not subject to these wheeling obligations and has no obligation to offer retail standard offer rates as a backup for its retail customers. See Mass. Gen. Laws ch. 164, § 47A.

Norwood says that the wholesale standard offer rates were denied to it and are below the market rate; it argues that FERC therefore should have held hearings to determine whether the rates were unduly discriminatory. [8] FERC explained the special rates by pointing to the New England Power affiliates' obligation to offer retail standard offer rates to their own customers and their consequent need for dovetailed wholesale standard offer rates from their supplier. *New England Power Co., 82 F.E.R.C. P61,179, at 61,664.* Norwood was not similarly situated because it had no similar obligation. On the surface, this is a plausible explanation for differential treatment, at least in the absence of some plausible rejoinder from

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[8] Norwood did not clearly raise this issue before FERC when the standard offer rate was initially filed. In the settlement proceeding in which the standard offer rate was first accepted by FERC, Norwood primarily argued that the standard offer rates were too high--it worried that the prices would eventually apply to it as well. In its motion for rehearing, Norwood added the argument that the standard offer rates were below the then-applicable Tariff No. 1 rates. But by the time FERC decided the motion, Norwood had apparently repudiated its Tariff No. 1 contract with New England Power; FERC therefore determined that Norwood could no longer claim to be harmed by the rate differential. *New England Power Co., 83 F.E.R.C. P61,265, at 62,106 (1998).* FERC did discuss the standard offer rates in the context of the divestiture proceeding, where the rate agreements were assumed by USGenNE. See, e.g., *New England Power Co., 82 F.E.R.C. P61,179, at 61,664.*

Norwood.

Norwood also complains that the wholesale standard offer rates were not justified by cost-of-service data. New England Power did not submit any because it contended that the initial standard offer rates did not amount to a rate increase and cost-of-service data was therefore not required by FERC regulations. 18 C.F.R. § 35.13(a)(iii). When USGenNE proposed to take over the standard offer service from New England Power, it did so as part of its application for "market-based rate" approval: FERC approved the petition in relevant part, concluding that USGenNE need not be limited to cost-of-service rates because it did not have market power in generation or transmission. *New England Power Co., 82 F.E.R.C. P61,179, at 61,662, 61,665.* See generally *Louisiana Energy & Power Auth. v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998).* Norwood offers no response to these arguments.

3. This brings us to Norwood's final set of arguments, alleging that the FERC actions it attacks will have a series of anticompetitive effects. One action is the relatively high contract termination charge imposed on Norwood; the second is the provision to Mass Electric of the favorable wholesale standard offer rates. Taken together, says Norwood, these steps will have a variety of anticompetitive consequences and, at the very least, FERC should have conducted an evidentiary inquiry into this claim.

Conceivably, a difference in treatment otherwise justified night be less so if it had an anticompetitive impact, see *Cities of Bethany v. FERC, 234 U.S. App. D.C. 32, 727 F.2d 1131, 1141* (D.C. Cir.), cert. denied, *469 U.S. 917 (1984),* and the agency might be faulted if it declined even to inquire into a well-supported claim of this kind, cf. *Michigan Pub. Power Agency v. FERC, 295 U.S. App. D.C. 407, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992).* In the agency and in this court, Norwood has alleged

anticompetitive effects. But mere allegations of impact do not trigger an evidentiary hearing. To justify a hearing, the allegations must raise a genuine issue of material fact that cannot be adequately resolved on the written record. *Louisiana Energy & Power Auth. v. FERC, 141 F.3d 364, 371 (D.C. Cir. 1998).* [9]

Here, Norwood appears to allege three different effects: that the initial wholesale standard offer rates are so low that they will discourage the development of wholesale competition in New England that might otherwise provide lower prices for Norwood, enabling it better to serve its customers and to compete with New England Power affiliates; that the denial of standard offer rates to Norwood in these early years, coupled with a high contract termination charge, will force Norwood's costs to a level well above those of New England Power's affiliates, again impairing Norwood's ability to compete with those affiliates; and that higher standard offer rates in later years will force up the general level of wholesale prices in New England, harming consumers and Norwood at the same time.

These assertions appear, with more or less detail, in the affidavits of two experts that Norwood submitted to FERC. They were countered in some measure by other expert testimony. While some of the assertions in Norwood's affidavits are doubtful at best, the Commission's orders offer only a relatively sketchy discussion of competitive impact. In sum, if Norwood had seriously briefed the issue, we might have a serious issue to

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[9] 18 C.F.R. § 2.17 provides special procedures for triggering a hearing where a wholesale customer makes a prima facie showing that price discrimination results in a "price squeeze" (in short, a combination of high wholesale prices and low retail prices that makes it impossible for a wholesale customer to compete with its supplier at the retail level). See *Cities of Bethany, 727 F.2d at 1140-41 & n.41.* Although Norwood sometimes refers to the contested prices as a price squeeze, it does not here purport to have made the specific showing necessary to trigger 18 C.F.R. § 2.17.

decide.

Instead, Norwood's main brief offers us only a couple of conclusory statements coupled with references to its affidavits. Norwood makes little effort to explain the basis for its predictions, does not match them up with what the Commission said in its orders, and does not address obvious critical issues: e.g., the actual extent of competition between Norwood and New England Power's affiliates, each of whom primarily serves separate retail areas; why new wholesale competition will not develop as the wholesale standard offer rates rise; and why imports of electricity will not constrain USGenNE.

Since Norwood has virtually abdicated its responsibility to brief the issue to us, FERC's own brief only touches on the competition issues; the New England Power brief, although more helpful, offers only brief comments on a few points. Thus, we have no coherent and developed argument in this court to address on the competition issue. In these circumstances, Norwood has forfeited its argument; developing a sustained argument out of economic materials and legal precedents is the job of the appellant, not the reviewing court, as we have previously warned. *U.S. Healthcare, Inc. v. Healthsource Inc., 986 F.2d 589, 595-97 1*st Cir. 1993); see also *Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1113 (1st Cir. 1993).*

Indeed, in an area this complicated, it is doubtful that we could do an adequate job on our own, although we might still try if a severe threat to the public interest appeared likely from the affidavits. But a negative long-term effect on power rates in New England is among the less plausible of the conjectures; and the short-term competitive impact on Norwood is something that it should have been able to explain and support in an appellate brief (if the materials were in the record) and it has not done so. Payment of a large termination charge, due in some measure to Norwood's own maneuvers, is not the same thing as

demonstrated harm to competition.

4. Northeast Center describes itself as a non-profit corporation dedicated to "public education regarding environmental changes related to technology and energy uses." While Norwood is primarily concerned with rates and termination charges, Northeast Center's focus is on the transfer of generating facilities from New England Power to USGenNE and the related transfer of hydroelectric licenses.

Both of these steps required the Commission's approval under a broad "public interest" standard. *16 U.S.C. §§ 801,* 824b(a); 18 C.F.R. § 93. [10] Northeast Center intervened in the administrative proceedings and asked the Commission to hold evidentiary hearings on two alleged possible effects of the transfers: harm to the environment and reduced property tax revenues for towns that collected property taxes on the facilities. The Commission declined to do so or to prepare an environmental impact statement or assessment. *New England Power Co., 82 F.E.R.C. P62,138, at 64,214-15 (1998),* reh'g denied, *83 F.E.R.C. P61,272, at 62,132-34 (1998); New England Power Co., 82 F.E.R.C. P61,179, at 61,661 (1998),* reh'g denied, *83 F.E.R.C. P61,275, at 62,148-49 (1998).*

In this court, Northeast Center says that these failures were error. FERC counters that Northeast Center lacks Article III standing to pursue these issues in court. Article III standing is a threshold issue, *Steel Co. v. Citizens for a Better*

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[10] FERC's order approving the divestiture did not purport to approve the sale of the hydropower projects as a whole, but only those facilities within FERC's jurisdiction by virtue of their use for transmission of electric energy in interstate commerce and/or for sale of electric energy at wholesale in interstate commerce. See *16 U.S.C. § 824*(b)(1). Jurisdictional facilities mentioned by New England Power in its application included generating leads and step-up transformers.

Environment, 523 U.S. 83, 88-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The burden to show standing is upon the litigant whose standing is challenged, *Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995),* and is not established merely because the agency permitted intervention, *City of Orrville v. FERC, 331 U.S. App. D.C. 165, 147 F.3d 979, 985 (D.C. Cir. 1998).*

The pertinent ground rules for association standing are clear enough in the abstract: to pursue judicial review, an association or similar representative organization may have standing if at least one of its members has standing in his or her own right, the interests served by the suit are pertinent to the mission of the organization, and relief does not require the presence of the members in the suit. *United States v. AVX Corp., 962 F.2d 108, 116 (1st Cir. 1992).* An individual has standing if he can show that he is suffering or is threatened with injury in fact to a cognizable interest; that the injury is causally connected to the conduct complained of; and that the court is competent to afford relief that will or is likely to redress the injury. *Bennett v. Spear, 520 U.S. 154, 162, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997).*

We start with the claim of environmental injury. Northeast Center says that it is concerned with the environment, and its member directors live in Vermont and New Hampshire and use the Connecticut River and its tributaries for recreation. The hydroelectric facilities being transferred are located in these states on the Connecticut River. And, it is alleged, the transfer from one licensee and owner (New England Power) to the other (USGenNE) could affect the management of the dams, primarily with regard to water releases and timing, in ways that affect recreational uses, erosion, flooding and water quality.

Thus, the issue of standing and "the merits" substantially overlap. FERC's public interest standard encompasses

environmental concerns, see *Wisconsin v. FERC, 322 U.S. App. D.C. 419, 104 F.3d 462, 470 (D.C. Cir. 1997)*, and arguably a substantial threat from the transfer would require attention, cf. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 277 U.S. App. D.C. 350, 876 F.2d 109 (D.C. Cir. 1989); Southern Cal. Edison Co., 49 F.E.R.C. P61,091 (1989)*. But if there is no credible threat, then the Northeast Center and its members lack standing, *Adams v. Watson, 10 F.3d 915, 922-23 (1st Cir. 1993)*, and, even if they had standing, FERC's refusal to pursue a speculative claim would not be error. *Northeast Utils. Serv. Co. v. FERC, 993 F.2d 937, 958-59 (1st Cir. 1993)*.

From either standpoint, the present case is not a close one. FERC was understandably skeptical of the environmental claim; building and operating a major new dam is likely to have environmental consequences, but the transfer of existing facilities from one large utility to another is simply a change in ownership, and USGenNE became subject to the same license conditions and regulations that had bound New England Power. If there is anything in the history of USGenNE or its west coast parent that suggests that either would mismanage the facilities or disobey the conditions or regulations, Northeast Center has not mentioned it.

About all that Northeast Center has done is to refer in passing to a report by a joint state commission, which states that New England Power has done a superior job in managing river flows. But there is nothing to show or even suggest that USGenNE is likely to do a worse job in operating the same facilities or that any predictable variations in its performance are likely to have a significant effect on the environment. And this report, which is not directed specifically at USGenNE and, moreover, which Northeast Center hardly refers to in its briefs, is all that Northeast Center offers to support its claim of standing or its demand for a full-scale evidentiary investigation by FERC.

Even the more generous of the cases that uphold standing or require an environmental impact statement or assessment under the National Environmental Policy Act ("NEPA") [11] involved projects more likely to threaten harm or a more particularized showing that harm is threatened. Cf. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 683-90, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973).* FERC's own regulations, made in conformity with the governing regulations under NEPA, [12] categorically classify such transfers of ownership and licensing as the kind of projects not likely to have a significant environmental impact or to require a NEPA environmental impact statement or smaller scale assessment. 18 C.F.R. § 380.4(a)(8), (16). If there was reason here for a different outcome, Northeast Center has not provided it.

A FERC action that otherwise falls within a categorical exclusion to the NEPA requirements may nonetheless warrant an environmental assessment or environmental impact statement if

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[11] The National Environmental Policy Act ("NEPA"), *42 U.S.C. § 4321* et seg., requires federal agencies to prepare a detailed environmental impact statement regarding any "major Federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332*(2)(C). Implementing regulations direct an agency to prepare a less detailed environmental assessment when the agency is uncertain whether an environmental impact statement is required for a given action. 40 C.F.R. § 1501.4 (1998).

[12] NEPA regulations direct agencies to identify categories of actions that normally do not require either environmental impact statements or environmental assessments because the agency has found that, as a class, they "do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. FERC's categorical exclusions include, in relevant part, transfers of water power project licenses and approval of actions under section 203 of the Federal Power Act relating to acquisition or disposition of property. 18 C.F.R. § 380.4(a)(8), (16).

the action may affect, inter alia, wetlands, anadromous fish species, or a National Refuge, 18 C.F.R. § 380.4(b), all of which Northeast Center says are affected by the projects at issue. But the regulation only requires an assessment or impact statement if "circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment." Id. As discussed above, Northeast Center has not presented any evidence indicating how the license and asset transfers (as opposed to the projects themselves) will have any impact on the environment.

Turning to economic impact, the nature of Northeast Center's claim is quite different. It asserts that competition in the supply of electric power is likely in some cases to impair the value of the existing utility plant, and it points to a Moody's investment survey to support that view. The actions taken in this case by the Commission are designed to foster competition. Ergo, says Northeast Center, the value of the transferred generating facilities may be reduced and the property taxes paid to local communities may decline. This, it says, should have been investigated.

It is sufficient to dispose of this case that Northeast Center has not shown that its own interests would be affected by such a decline in property taxes; and, even assuming that its members or directors might be so affected (based on residence), Northeast Center has not shown that its representational function extends to such private economic concerns. Germaneness of the interests served by a lawsuit to the purpose of the organization is a settled requirement for standing based on membership, *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)*, "preventing litigious organizations from forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care." *Humane Soc'y of the United States v. Hodel,*

268 U.S. App. D.C. 165, 840 F.2d 45, 57 (D.C. Cir. 1988); see also *UAW v. Brock, 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986).*

Accordingly, we need not reach the question whether a showing of likely economic impact, made by a person with standing, would compel FERC to pursue the matter, but we are entitled to express our doubts. It is true that the public interest concept is a broad one, but there are limits. Here, FERC has approved a set of transactions based on their effects in the electric power industry, its main responsibility and concern. It is far from clear that a policy aimed at securing lower-cost power for consumers through more competition would or should be curtailed even if it were shown to have some effect on plant value and local taxes in a few communities. Cf. *Northeast Utils. Serv. Co. v. FERC, 993 F.2d 937, 951 (1st Cir. 1993).*

It is worth adding that, to the extent such effects may be predicted from competition, the effects are primarily due to actions already taken by FERC in broader proceedings such as the one that led to Order No. 888. And while competition may well reduce the economic value of some existing plants, this case may be an exception: ironically, Northeast Center's exhibit suggests that the transferred facilities sold for more than their book value.

The petitions for review are denied.

NEW ENGLAND POWER COMPANY
81 FERC ¶61,281 (1997)

LETTER ORDER - November 26, 1997

On May 29 and 30, 1997, you filed with the Commission, on behalf of New England Power Company (NEPCO), a settlement agreement among NEPCO, Massachusetts Electric Company (Masselec), and other parties, and a settlement agreement among NEPCO, Narragansett Electric Company (Narragansett), and certain other parties in the above referenced dockets. In order to accommodate the introduction of retail competition programs in Massachusetts and Rhode Island, the settlements shorten the notice of termination provision from seven years to a 90-day notice period to allow for earlier termination by Masselec and Narragansett of their requirements service under NEPCO's Tariff No. 1. Both settlements provide NEPCO the opportunity to recover stranded costs in the form of Contract Termination Charges (CTC). The settlements, among other things, also provide for Wholesale Standard Offer Service which allows Masselec and Narragansett the option to purchase power from NEPCO to serve retail customers who do not obtain power from alternative suppliers under their respective retail competition programs. In addition, both settlements include provisions proposing to restrict the Commission's future review of the justness and reasonableness of the CTC, and a proposal for the jurisdictional separation of transmission and local distribution facilities (T/LD Split).

On June 18 and 19, 1997, Commission trial staff filed comments in support of the settlements. On June 18, 1997, the Town of Norwood, Massachusetts and Wheelabrator Environmental Systems, Inc. (Wheelabrator) filed comments in opposition to the settlements. Reply comments were filed by the Commission's trial staff, NEPCO, Norwood, Massachusetts Department of Utilities, and the Massachusetts Department of

Energy Resources. The Rhode Island Public Utilities Commission (Rhode Island Commission) and the Rhode Island Division of Public Utilities and Carriers (Rhode Island DPUC) filed comments out-of-time on July 1, 1997. The Office of the Attorney General of Massachusetts (Massachusetts Attorney General) also filed reply comments on July 1, 1997. On July 2, 1997, Wheelabrator filed a motion to withdraw its comments opposing the settlements. On July 11, 1997, the presiding Administrative Law Judge certified the settlements to the Commission as contested settlements presenting no genuine issues of material fact.

On September 11, 1997, Norwood filed a motion to reopen the evidentiary record to present new evidence. On September 17 and 26, 1997, NEPCO, the Rhode Island DPUC, the Rhode Island Commission, and Massachusetts Attorney General filed answers in opposition to Norwood's motion to reopen the record.

As correctly noted by NEPCO, the presiding Administrative Law Judge and Commission trial staff, the provisions of the settlements do not directly affect Norwood. Until Norwood terminates its requirements service contract with NEPCO, it does not face any stranded cost charges. Similarly, Norwood is not directly affected by the rates proposed for the Wholesale Standard Offer Service, which Norwood is not obligated to purchase.

Regarding the proposed T/LD Split, the Commission notes that approval of the proposed T/LD Split is not a condition of the settlement. Furthermore, the Commission clarified in Order No. 888-A that "there is an element of local distribution

service in any unbundled retail transaction." [1] Accordingly, Commission approval of the proposed T/LD Split is not required to allow either Massachusetts or Rhode Island to assess a surcharge for retail stranded cost recovery. In light of these facts, it is unnecessary for the Commission to address the proposed T/LD split and we make no findings regarding that issue in this order.

Sections 3.6 and 6.1.4 of the settlements propose to restrict not only the rights of parties to the settlement, but also non-settling parties' rights to apply to the Commission for changes to the CTC under sections 205 and 206 of the Federal Power Act, absent consent by NEPCO. A settlement may not restrict the rights of non-settling parties to apply to the Commission for changes in rates pursuant to section 206 under a "just and reasonable" standard. Nor may a settlement preclude the Commission, in order to protect the interests of non-settling parties, from investigating rates, terms and conditions pursuant to section 206 under a "just and reasonable" standard at such times and under such circumstances as it deems appropriate. The settling parties may, however, agree to bind themselves to a "public interest" standard of review as to their own future attempts to change rates, terms and conditions, and similarly may bind the Commission to a "public interest" standard of review when acting sua sponte on behalf of the settling parties.[2] Accordingly, the Commission conditionally approves the proposed settlements subject to the settlement parties agreeing to revise Sections 3.6 and 6.1.4 to eliminate restrictions on non-

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[1] Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,335 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997).

[2] Southern Company Services, Inc., 67 FERC ¶ 61,080 at 61,227-28 (1994); Carolina Power & Light Company, 67 FERC ¶ 61,074 at 61,205 (1994).

settling parties' rights and the Commission's rights when acting on behalf of non-settling parties. The settling parties will have 30 days from the date of this order to amend Sections 3.6 and 6.1.4 of the settlements as discussed above.

We further note that NEPCO has not submitted its proposed accounting for stranded costs and related revenues, as required by Order No. 888. [3] Accordingly, we will require NEPCO to submit its proposed accounting within 30 days from the date of this order.

The subject settlements are in the public interest and are hereby conditionally approved. The rates submitted with the settlements are accepted for filing and designations will be assigned upon Commission acceptance of the required compliance filing. The Commission's conditional approval of the settlements does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

By direction of the Commission.

Lois D. Cashell,
Secretary.

cc: To All Parties of Record

Massachusetts Department of Public Utilities
100 Cambridge Street
Boston, Massachusetts 02202

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[3] Order No 888, FERC Stats. & Regs. ¶ 31,036 at 31,846 (1996).

UNITED STATES OF AMERICA 83 FERC ¶ 61,265
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

New England Power Company) Docket Nos. ER97-678-002
) and ER97-680-002

ORDER DENYING REHEARING

(Issued June 3, 1998)

In this order, the Commission denies the request for rehearing filed by the Town of Norwood, Massachusetts (Norwood) of the letter order issued November 26, 1997 (November 26 order) approving the settlement agreements between New England Power Company (NEPCO) and certain of NEPCO's distribution affiliates in Massachusetts and Rhode Island.

I. Background

The procedural background of this case is set forth in detail in the Certification of Contested Proposed Settlement Agreements issued July 11, 1997 by the Presiding Administrative Law Judge (Presiding Judge). [1]

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[1] New England Power Company, 80 FERC ¶ 63,003 (1997) (Certification Order).

In brief, NEPCO is the generation and transmission subsidiary of the New England Electric System (NEES). On December 3, 1996, NEPCO proposed to amend the full requirements service agreements under its Tariff No. 1 between NEPCO and its distribution affiliates in Massachusetts [2] and in Rhode Island. [3] The amendments were designed to accommodate the introduction of retail competition programs in Massachusetts and Rhode Island and to further a proposed comprehensive restructuring of NEES.

On January 30, 1997, the Commission issued an order establishing hearing procedures. [4] On May 28 and May 30, 1997, NEPCO filed, pursuant to 18 C.F.R. § 385.602 (1997), two stipulations and agreements (Settlement Agreements) that were intended to resolve all issues in the two dockets. [5]

As described by the Presiding Judge in the Certification Order, the Settlement Agreements would amend Mass Electric's and Narragansett's service agreements under Tariff No. 1 to, among other things:

(1) permit the affiliated customers to terminate wholesale purchases from NEPCO under Tariff No. 1 on or after

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[2]Massachusetts Electric Company and Nantucket Electric Company (collectively, Mass Electric) (Docket No. ER97-678-000).

[3]Narragansett Electric Company (Narragansett) (Docket No. ER97-680-000). Narragansett and Mass Electric are referred to hereinafter as "the affiliated customers."

[4]New England Power Company, 78 FERC ¶ 61,080 (1997) (Hearing Order).

[5]Because the two Settlement Agreements are identical in all material respects, we will not distinguish between them hereinafter.

January 1, 1998 upon 90-days' notice or upon the introduction of retail competition;

(2) require the affiliated customers, upon termination of service from NEPCO under Tariff No. 1, to pay NEPCO what is known as a Contract Termination Charge (CTC) which is designed to recover stranded costs associated with, inter alia, NEPCO's investment in generating assets, contractual commitments for purchased power and fuel transportation, deferred costs and other regulatory assets, plus a return on unrecovered costs;

(3) require NEPCO to credit against the affiliated customers' CTC responsibility a proportionate share of the remaining value of NEPCO's generating business, which NEPCO intends to divest as part of the state retail competition programs; and

(4) require NEPCO to provide the affiliated customers with Wholesale Standard Offer Service at a fixed price schedule for use in supplying electricity at retail for those customers that choose not to participate in the retail electric market, although neither affiliated customer is required to purchase power under this service after retail competition begins.

The Settlement Agreements also committed NEPCO to file with the Commission a plan to implement divestiture of its generation business by October 1, 1997, and to complete divestiture within six months after retail competition is implemented or upon receipt of all necessary governmental approvals. [6]

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[6]Certification Order, 80 FERC at 65,034-35.

Norwood filed comments opposing the Settlement Agreements. As summarized by the Presiding Judge, Norwood was concerned that the Settlement Agreements did not address the implications of NEPCO's ability to continue to provide wholesale requirements service to Norwood under Tariff No. 1, and the rate level thereunder, in light of NEPCO's planned divestiture of many of its generation assets. The Presiding Judge also explained that Norwood believed that it would become subject to the Settlement Agreements' CTC if and when it seeks to terminate service from NEPCO, and that the CTC did not comply with Order No. 888's requirements for calculating a wholesale customer's stranded cost obligation. Norwood also asserted that the Wholesale Standard Offer Service's proposed rates were unjust and unreasonable and would adversely affect prices in the emerging competitive marketplace. In addition, Norwood complained that the Settlement Agreements discriminated against Norwood because they treat the affiliated customers differently from Norwood. [7]

The Presiding Judge found that Norwood had failed to demonstrate the existence of any genuine issues of material fact in dispute that would preclude certification of the contested settlements to the Commission under Rule 602(h)(2)(ii). [8] First, with regard to Norwood's concerns regarding the CTC, he stated:

> Norwood's claim that the stranded cost recovery implicit in the settlement proposals is unjust, unreasonable and fails to comply with the Commission's calculation requirements rings hollow as a basis for withholding certification of the settlement proposals. Norwood, as a Tariff No. 1 customer of NEPCO that has not signed

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[7] Id. at 65,037-38.

[8] 18 C.F.R. § 384.602(h)(2)(ii) (1997).

> onto the settlement, is unaffected by the agreement of [Mass Electric] and Massachusetts regulators and consumer representatives that will require [Mass Electric] to pay [a] CTC in exchange for divestiture and implementation of retail competition. Norwood does not have to pay stranded costs under the settlement, and may continue to avoid such charges for as long as it chooses to remain a NEPCO customer. [9]

The Presiding Judge specifically noted that, in Order No. 888, the Commission stated that it would consider case-specific proposals for dealing with stranded costs in the context of corporate restructuring proposals, [10] and explained that in the Hearing Order, the Commission had found that the CTC proposal "is based upon a formula that provides sufficient specificity for Commission and customer review." [11]

The Presiding Judge characterized as "premature" Norwood's concerns that its rates under Tariff No. 1 would in the future be based only on higher-cost assets that NEPCO did not divest, and he emphasized that there were procedural safeguards under Federal Power Act (FPA) sections 205 and 206 sufficient

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[9]80 FERC at 65,040.

[10]Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,845-46, order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[11]80 FERC at 65,040 (citing 78 FERC at 61,29[illegible].2).

to protect Norwood's future interests. [12] As for Norwood's assertions that the prices for NEPCO's Wholesale Standard Offer Service were unreasonable (because they escalate over 59 percent through the year 2004) and would skew prices in the emerging competitive market, the Presiding Judge noted that Norwood is unaffected by this provision because it is not required to purchase Wholesale Standard Offer Service. [13]

Lastly, the Presiding Judge rejected Norwood's contention that it was discriminatory for it to be bound to the terms of Tariff No. 1, while the affiliated customers would have different terms under the Settlement Agreement, including the right to terminate service early. First, he noted that Norwood also objected to the different service terms offered the affiliated customers. Second, he stated: "Norwood is free to continue receiving service from NEPCO under the terms of its existing contract until it expires. It may also elect to terminate service early, pay appropriate stranded costs and shop in the competitive market." [14]

In the November 26 order, the Commission conditionally approved the Settlement Agreements. The Commission agreed with the Presiding Judge that the provisions of the Settlement Agreements do not directly affect Norwood. The Commission stated: "Until Norwood terminates its requirements service contract [under Tariff No. 1] with NEPCO, it does not face any stranded cost charges. Similarly, Norwood is not directly affected by the rates proposed for the Wholesale Standard Offer

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[12] Id. at 65,040.

[13] Id.

[14] Id.

Service, which Norwood is not obligated to purchase." [15]

II. Related Proceedings

On October 1, 1997, as later amended, NEPCO, Narragansett, and USGen New England, Inc. (USGen NE) filed in Docket Nos. EC98-1-000 and ER98-6-000, among other things, an application under section 203 of the FPA for authorization of the proposed sale by NEPCO and Narragansett of certain jurisdictional facilities in association with the sale of substantially all of NEPCO's and Narragansett's non-nuclear generation assets to USGen NE. The sale was one aspect of arrangements agreed to among NEPCO, Narragansett, the Massachusetts Attorney General, and Rhode Island and Massachusetts regulatory authorities to implement retail competition programs in those states. In these proceedings, NEPCO also proposed to modify the CTC applicable to Narragansett and Mass Electric primarily to replace estimated revenues and costs with actual figures associated with the sale of generating assets to USGen NE and to make other, minor changes. In addition, USGen NE filed Wholesale Standard Offer Service agreements which would replace NEPCO's identical agreements with Narragansett and Mass Electric, which had been accepted for filing in the November 26 order.

On February 25, 1998, the Commission issued an order that, among other things, approved the sale of jurisdictional

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[15]Slip op. at 2. As a condition of approval of the Settlement Agreements, the Commission required NEPCO to revise those sections of the Settlement Agreements that purported to restrict not only the rights of the settling parties, but also the rights of non-settling parties, to apply to the Commission for changes to the CTC under FPA sections 205 and 206. The Commission also required NEPCO to file certain accounting information. We will address NEPCO's compliance filing in a separate order.

facilities, accepted for filing the changes to the CTC formula without suspension or hearing, and accepted for filing USGen NE's Wholesale Standard Offer Service agreements. [16]

As part of its application in Docket No. EC98-1-000, NEPCO proposed an open season to allow wholesale customers to terminate service early, provided they agree to pay an appropriate CTC. On March 18, 1998, in Docket No. ER98-2233-000, NEPCO proposed to amend Tariff No. 1 to implement the open season proposal by authorizing early termination conditioned on the payment of a CTC. As NEPCO explains, [17] on March 5, 1998, it received a written request from Norwood seeking to terminate service under Tariff No. 1 effective April 1, 1998. NEPCO indicates that it is willing to allow Norwood to terminate service under Tariff No. 1 effective April 1, 1998, subject to the payment of the CTC proposed in Docket No. ER98-2233-000. [18] By order issued May 15, 1998, the Commission accepted for filing, without hearing or suspension, NEPCO's proposed amendment to Tariff No. 1, effective March 31, 1998. [19]

III. Issues on Rehearing

On rehearing, Norwood reiterates many of the objections to the Settlement Agreements that it had raised in its earlier

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[16]New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc., 82 FERC ¶ 61,179 (1998), reh'g pending.

[17]Application in Docket No. ER98-2233-000 at 3-4.

[18]Id. at 4 n.8.

[19]New England Power Company, 83 FERC ¶ 61,174 (1998).

comments. [20] It again argues that NEPCO's CTC formula does not conform to Order No. 888's requirements for stranded cost recovery, objects to the rates for Wholesale Standard Offer Service, complains that NEPCO will not allow it to terminate service under Tariff No. 1 early, as NEPCO did for the affiliated customers, and argues that the Commission should have delayed approval of the Settlement Agreements pending review of NEPCO's divestiture application.

Some of Norwood's continued objections have been mooted in the interim between our approval of the Settlement Agreements and the present. First, as discussed above, in Docket No. ER98-2233-000, we accepted for filing NEPCO's amendment to Tariff No. 1 which will allow Norwood to terminate service early upon payment of a CTC. Indeed, it appears that Norwood in fact terminated service as of April 1, 1998. Thus, Norwood's claim of discriminatory treatment vis-a-vis NEPCO's affiliated customers does not lie. NEPCO's application in Docket No. ER98-2233-000 extends to unaffiliated customers, such as Norwood, the same option of

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[20] In its rehearing request, Norwood relies extensively on its late-filed affidavits, which, because they were untimely filed, the Presiding Judge had refused to accept and consider for the purposes of determining whether there were genuine issues of material fact in dispute precluding certification of the contested Settlement Agreements. However, the Presiding Judge noted: "Norwood's comments, even if supported by the late-filed affidavits, raise no genuine issue of material fact that would preclude certification of the settlement proposals to the Commission." 80 FERC at 65,040. We agree with the Presiding Judge that Norwood's arguments opposing the terms and conditions of the Settlement Agreements are not advanced by the affidavits.

NEPCO filed an answer to Norwood's request for rehearing, and Norwood filed a reply to NEPCO's answer. The Commission's rules generally prohibit answers to requests for rehearing, 18 C.F.R. § 385.713(d) (1997), and accordingly, we will reject NEPCO's answer and Norwood's reply.

early termination conditioned upon payment of a CTC as the Settlement Agreements afforded Mass Electric and Narragansett. Second, NEPCO's divestiture has been approved by the Commission in Docket Nos. EC98-1-000 and ER98-6-000, thereby mooting Norwood's request that we defer action on the Settlement Agreements pending resolution of the divestiture application. [21]

With regard to the remaining issues, we reaffirm our finding that the Settlement Agreements are in the public interest and reaffirm our conditional approval of them. We reiterate what we previously held in the November 26 order, and what the Presiding Judge found when certifying the Settlement Agreements: Norwood is not directly affected by the rates, terms, and conditions of the Settlement Agreements. The Settlement Agreements do not impose any stranded cost obligation on Norwood. Rather, they modify only the terms of NEPCO's service agreements with Mass Electric and Narragansett. Norwood would be subject only to the CTC accepted for filing in Docket No. ER98-2233-000. Thus, we dismiss Norwood's objections to the CTC applicable to Mass

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[21]We note that Norwood has consistently, if incorrectly, complained throughout these proceedings that the Settlement Agreements themselves authorize the divestiture. The Settlement Agreements expressly state that the divestiture is subject to regulatory approval. Section 6.1.1 of the Settlement Agreements, cited by Norwood on page 6 of its Request for Rehearing, states: "NEP[CO] agrees, subject to the receipt of all governmental approvals, to sell, spin off or otherwise transfer ownership of its generating business to a nonaffiliated entity or entities, other than properties, assets, and entitlements classified to the transmission function." (Emphasis added.) The approval of this Commission of the divestiture of those facilities jurisdictional to it was obtained in Docket No. EC98-1-000.

Electric's and Narragansett's service agreements. [22] We have duly considered in Docket No. ER98-2233-000 the concerns raised by Norwood with regard to the only CTC it would be subject to by NEPCO under Tariff No. 1.

As for Wholesale Standard Offer Service, just as with the CTC authorized in the Settlement Agreements, Norwood is not directly affected by the rates, terms, and conditions proposed for Wholesale Standard Offer Service. Norwood has failed to demonstrate that Wholesale Standard Offer Service, which was negotiated between NEPCO and various state authorities, will increase rates in the New England region. Furthermore, Norwood will never be required to buy power from NEPCO (now, USGen NE) at the prices specified in the Settlement Agreements for Wholesale Standard Offer Service. Rather, this service will allow, but does not require, Mass Elec and Narragansett to purchase wholesale power to, in turn, provide retail service to those eligible retail customers who do not choose to obtain power from alternative suppliers.

In sum, we are unable to conclude that Norwood has been disadvantaged in any way by our approval of the Settlement Agreements. Accordingly, we deny rehearing.

The Commission orders:

(A) Norwood's request for rehearing is hereby denied, as discussed in the body of this order.

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[22] We will note, however, in response to Norwood's assertion that the CTC formula authorized in the Settlement Agreements does not conform to the requirements of Order No. 888, that (as the Presiding Judge correctly observed) we are willing to consider case-specific proposals for stranded-cost recovery in the context of voluntary restructuring proceedings instituted by public utilities. Order No. 888 at 31,845-46.

(B) NEPCO's answer to Norwood's request for rehearing and Norwood's reply to NEPCO's answer are hereby rejected, as discussed in the body of this order.

By the Commission.

(SEAL)

David P. Boergers,
Acting Secretary.

UNITED STATES OF AMERICA 82 FERC ¶ 61,179
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hebert, Jr.

New England Power Co.,)
Narragansett Electric Co.) Docket Nos. EC98-1-000
AllEnergy Marketing Co., L.L.C.) and ER98-6-000
and USGen New England, Inc.)

ORDER APPROVING SALE OF
JURISDICTIONAL FACILITIES,
ACCEPTING FOR FILING PROPOSED
MARKET-BASED RATES, CONDITIONALLY
ACCEPTING FOR FILING PROPOSED
MARKET-BASED RATES, ACCEPTING
PROPOSED RATES FOR FILING,
AS MODIFIED IN PART, REJECTING
PROPOSED RATES, WITHOUT PREJUDICE
TO REFILING AND ACCEPTING
FOR FILING AND SUSPENDING PROPOSED RATES

(Issued February 25, 1998)

On October 1, 1997, as amended on November 5, 1997 and November 20, 1997, New England Power Company (NEPCO) and Narragansett Electric Company (Narragansett) (jointly, the NEES Companies) and USGen New England, Inc. (USGenNE) (collectively, the Applicants) filed an application under section 203 of the Federal Power Act (FPA) for authorization of the proposed sale by the NEES Companies of

certain jurisdictional facilities as part of the sale of substantially all of their non-nuclear generation assets to USGenNE (Divestiture Transaction). In addition, NEPCO and USGenNE filed, under section 205 of the FPA, several proposed agreements and amendments to existing rates in connection with the implementation of the proposed Divestiture Transaction. Further, NEPCO, AllEnergy Marketing Company, L.L.C. (AllEnergy) [1] and USGenNE filed proposed market-based power sales rates. [2]

As discussed below, we will approve the proposed Divestiture Transaction, accept for filing NEPCO's and AllEnergy's market-based rates, conditionally accept for filing USGenNE's proposed market-based rates, and conditionally accept for filing, subject to the conditions and modifications described herein, NEPCO's and USGenNE's proposed agreements and amendments to existing rates.

BACKGROUND

I. The Proposed Divestiture Transaction

A. Description of the Divestiture Transaction Participants

1. The NEES Companies

NEPCO is a subsidiary of the New England Electric System (NEES). NEES, a registered public utility holding

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[1]AllEnergy is an affiliate of NEPCO.

[2]NEPCO and USGenNE also made filings under section 8 of the FPA to transfer six hydroelectric licenses from NEPCO to USGenNE as part of the Divestiture Transaction. Those filings will be addressed in a separate order.

company under the Public Utility Holding Company Act of 1935 (PUHCA), is undergoing a comprehensive restructuring, including the divestiture of its generating business in preparation for the introduction of retail competition programs in Massachusetts and Rhode Island.

NEES has, among other things, a number of wholly-owned electric utility subsidiaries: NEPCO, Narragansett, Massachusetts Electric Company (Massachusetts Electric), Granite State Electric Company (Granite State), and Nantucket Electric Company (Nantucket). NEPCO provides wholesale requirements service to Narragansett, Massachusetts Electric, Granite State, and Nantucket as well as various non-affiliated customers in four states. Narragansett provides retail service in Rhode Island. Massachusetts Electric provides retail service in Massachusetts. Granite State provides retail service in New Hampshire. Nantucket provides retail service on the Island of Nantucket in Massachusetts. NEES also owns Narragansett Energy Resources Company (Narragansett Energy), which owns a twenty (20) percent interest in two partnerships that own the Ocean State Power project, which is an independent power project.

NEES also has three electric utility subsidiaries that own and operate only transmission facilities that comprise part of the transmission intertie between Canada and New England: New England Electric Transmission Corporation, New England Hydro-Transmission Electric Company, Inc., New England Hydro-Transmission Corporation. Ownership of those facilities is not affected by the proposed transaction.

2. USGenNE

USGenNE is a special purpose entity created for the purpose of purchasing, inter alia, (1) certain generating and transmission facilities and (2) the rights to power purchased by

NEPCO and Narragansett under certain agreements, pursuant to the Asset Purchase Agreement which governs the proposed divestiture. USGenNE is an indirect wholly-owned subsidiary of PG&E Corporation (PG&E Corp.), an exempt public utility holding company under section 3(a)(1) of PUHCA. The Applicants state that USGenNE does not currently own any generation, transmission, or distribution assets, or any other assets subject to the Commission's jurisdiction under the FPA.

B. Description of the Proposed Divestiture Transaction

The proposed Divestiture Transaction is the product of settlements (Settlement Agreements) among the NEES companies, the Massachusetts Attorney General, Rhode Island and Massachusetts regulatory agencies and other parties, which were entered into to implement retail choice programs in Massachusetts and Rhode Island. [3]

The Divestiture Transaction provides for the sale to USGenNE of substantially all of the NEES companies' non-nuclear generating assets including: (1) approximately 4,000 MW of fossil-fired and hydroelectric generating capacity owned by NEPCO; (2) Narragansett's ten percent ownership interest in the Manchester Street generating station (NEPCO owns the other 90 percent interest, which is being sold) [4]; and (3) Narragansett Energy's twenty percent ownership interest in

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[3]The Commission conditionally approved the settlements by letter order issued on November 26, 1997. New England Power Company, Docket Nos. ER97-678-000 and ER97-680-000 (unpublished) (1997), reh'g pending.

[4]With the exception of certain entitlements in nuclear units, a minority interest in Wyman Unit 4 (which will be sold separately), and certain diesel units, the NEES Companies will own only transmission and local distribution assets after the proposed transaction is complete.

Ocean State. [5] In addition to the generating assets, USGenNE will purchase NEPCO's entitlements in approximately 1,100 MW of power procured by NEPCO under long-term contracts with independent power producers and non-utility generators, if their consent is obtained.

In addition, the NEES Companies will dispose of those interconnecting transmission facilities necessary for USGenNE to effect wholesale sales. Consequently, the Applicants seek Commission approval of the sale and acquisition of the jurisdictional facilities associated with generating plants being sold by the NEES Companies to USGenNE.

In addition, NEPCO and USGenNE have entered into a number of related agreements that implement other provisions of NEES' restructuring plan. Those agreements have been filed under section 205 and are discussed later in this order.

II. Market-Based Rates

NEPCO, AllEnergy and USGenNE filed proposed market-based rates.

III. NEPCO's and USGenNE's Proposed Implementing Agreements

In connection with the implementation of the proposed Divestiture Transaction and market-based applications, the Applicants also filed: (1) amendments to NEPCO's service agreements with Massachusetts Electric and Narragansett under NEPCO's wholesale requirements tariff to implement the

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[5] Narragansett Energy's stock will be transferred to NEPCO prior to the sale to USGenNE.

residual value credit and to modify the contract termination charge (CTC) formula; (2) wholesale Standard Offer Agreements for the sale of power by USGenNE to Narragansett and Massachusetts Electric to supply Standard Offer Service; (3) a nuclear wholesale power agreement to provide USGenNE with a right to purchase the output from NEPCO's nuclear units during the Standard Offer Service Period; (4) a Continuing Site/Interconnection Agreement to provide interconnections from the divested generating stations to NEPCO's pool transmission facilities, and to agree to provide for voltage support and reactive power from USGenNE facilities to NEPCO's transmission system at prices determined under NEPOOL's open access transmission tariff; [6] (5) IPP Contracts Transfer Agreement to transfer NEPCO's purchase entitlements under certain power contracts to USGenNE, and to buydown NEPCO's obligations under those agreements; (6) an agreement for USGenNE to assume NEPCO's transmission rights and obligations under NEPCO's contracts with Hydro-Quebec; and (7) amendments to NEPCO's open access transmission tariff to reflect full unbundling and complete divestiture.

IV. Notice of Filings and Interventions

Notice of the aforementioned filings was published in the Federal Register, [7] with motions to intervene or protests due on or before December 1, 1997. A notice of intervention and timely motions to intervene raising substantive issues were filed by the Public Utilities Commission of the State of Rhode Island (Rhode Island Commission), Pawtucket Power

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[6] The Applicants state that in the event that NEPOOL's open access transmission tariff does not contain prices for these services, USGenNE will make a separate filing to establish a rate for the services.

[7] 62 Fed. Reg. 53,624 (1997), 62 Fed. Reg. 62,049 (1997).

Associates Limited Partnership (Pawtucket Power), Vermont Department of Public Service (VDPS), the Towns of Merrimac and Groveland, Massachusetts (Merrimac and Groveland), the Town of Norwood, Massachusetts (Norwood), the Massachusetts Municipals, [8] Northeast Utilities Service Company (NUSCO), Rhode Island Division of Public Utilities and Carriers (the Rhode Island Division), Northeast Center for Social Issue Studies (Center for Social Issue Studies), New Hampshire Electric Cooperative (NHEC), and Green Mountain Power Corporation (Green Mountain). The New Hampshire Office of the Consumer Advocate (New Hampshire OCA, the Maine Attorney General (Maine AG), Island Corporation (Island) and Ogden Haverhill Associates (Ogden) filed late motions to intervene raising substantive issues.

A notice of intervention and timely motions to intervene raising no substantive issues were filed by the Massachusetts Department of Public Utilities (Massachusetts Department), the Massachusetts Attorney General (Massachusetts AG), Cambridge Electric Light Company, Canal Electric Company (collectively, COM/Electric Companies), the Massachusetts Division of Energy Resources (Massachusetts Division), Massachusetts Municipal Wholesale Electric Company (MMWEC), Electric Clearinghouse, Inc. (Clearinghouse), and Millennium Power Partners, L.P. (Millennium). Unitil Power Corp. (Unitil Power), Sithe Energies, Inc. (Sithe) and Hydro-Quebec filed late motions to intervene raising no substantive issues.

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[8] The Massachusetts Municipals are: Middleton Municipal Electric Department; Shrewsbury's Electric Light Plant; North Attleborough Electric Department; Reading Municipal Light Department; Holden Municipal Light Department; Hingham Municipal Lighting Plant; Taunton Municipal Lighting Plant; Littleton Electric Light Department; and Braintree Electric Light Department.

On December 16, 1997, the Applicants filed an answer.

On January 9, 1998, the Massachusetts Municipals each filed requests for clarification in response to the Applicants' answer.

On January 23, 1998, NEPCO filed an answer opposing the requests for clarification.

DISCUSSION

I. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the notices of intervention of the Rhode Island Commission and the Massachusetts Department and the timely, unopposed motions to intervene of Pawtucket Power, VDPS, Merrimac and Groveland, Norwood, the Massachusetts Municipals, NUSCO, the Rhode Island Division, Center for Social Issue Studies, NHEC, Green Mountain, the Massachusetts AG, COM/Electric Companies, the Massachusetts Division, Clearinghouse and Millenium serve to make them parties to this proceeding. Due to the early stage of this proceeding and the absence of any undue delay or prejudice to any party, we will grant the late, unopposed motions to intervene of New Hampshire OCA, the Maine AG, Unitil Power, Island Sithe, Ogden and Hydro-Quebec.

Ordinarily, we might find that the Massachusetts Municipals' requests for clarification are really impermissible answers to the Applicants' answer under Rule 213(a)(2) of the Commission's Rules of Practice and Practice, 18 C.F.R. § 385.213(a)(2) (1997). However, given that the instant application represents part of a major restructuring of the electricity market in New England, it is appropriate to provide

the requested clarification regarding the scope of our order, which we do later in this order.

II. The Proposed Divestiture Transaction

As explained below, we will deny the motions to reject the application, and we will approve the proposed Divestiture Transaction as consistent with the public interest.

A. The Standard of Review Under Section 203

Section 203(a) of the FPA provides, in relevant part, as follows:

> No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.

16 U.S.C. § 824b(a) (1994). Under section 203(a), the Commission must approve a proposed transaction if it finds that the merger "will be consistent with the public interest." Id.

The Commission recently issued a policy statement updating and clarifying its procedures, criteria and policies applicable to public utility mergers. [9] The policy statement

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[9] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy

(continued...)

provides that the Commission will generally take account of three factors in analyzing proposed mergers: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation.

B. The Applicants' Statement of the Public Interest

In support of their application, the Applicants assert that the separation of NEPCO's generating business from its transmission assets is consistent with the policies set forth in the Massachusetts and Rhode Island programs for the restructuring of the electric utility industry. Applicants claim that the Divestiture Transaction will have no adverse effect on competition. The Applicants state that: (1) USGenNE has no generation, transmission or distribution assets; (2) USGenNE's affiliates only have nominal amounts of uncommitted capacity in NEPOOL and the adjacent New York Power Pool (NYPP); and (3) neither USGenNE nor its affiliates controls any gas supplies or gas pipeline capacity into the NEPOOL or NYPP areas other than amounts occasionally available when USGenNE affiliates' generation facilities operate at less than full capacity. Consequently, the Applicants claim that the combination of NEPCO's non-nuclear generation with USGenNE's affiliates' uncommitted generating capacity does not significantly increase market concentration in NEPOOL or present other opportunities for exercise of market power. The Applicants state that they performed a competitive screen analysis consistent with the Merger Policy Statement and that the analysis demonstrates that the transaction will not result in a change in market concentration in any relevant market that exceeds the thresholds established under the Merger Policy

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[9](...continued)
Statement), order on reconsideration, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997).

Statement. [10]

The Applicants claim that the proposed transaction will not adversely affect any of NEPCO's wholesale customers because: (1) USGenNE will assume NEPCO's obligation under the Settlement Agreements approved in Docket No. ER97-678-000, et al., to provide Standard Offer Service to Narragansett and Massachusetts Electric; [11] (2) the Applicants offer non-affiliated customers the option for early termination of their contracts on the same terms and conditions as provided for in the Settlement Agreements except that the Standard Offer Service rate would be applicable only through the end of the customer's current contract term; [12] (3) NEPCO will implement a rate freeze for the remainder of its wholesale customers, which will continue through the term of current agreements unless the customer initiates a section 206 proceeding to reduce its rates; and (4) NEPCO's power

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[10]Although they claim that the competitive analysis is not required under the circumstances of this application, the Applicants indicate that they submitted the analysis out of an abundance of caution and to augment USGenNE's market-based rate application.

[11]As part of the negotiated restructuring plans, Massachusetts Electric and Narragansett are permitted to terminate their wholesale purchase contracts with NEPCO early and switch to a Standard Offer Service, which reflects rate reductions from current levels. In return, Massachusetts Electric and Narragansett will pay a contract termination charge (stranded costs) to NEPCO in accordance with a specified formula.

[12]The Applicants indicate that the Littleton, New Hampshire Water and Light Department has agreed to terminate its requirements contract with NEPCO in return for the payment of a contract termination charge, and Granite State is in negotiations with New Hampshire for the provision of retail access for its customers, which will require early termination of those contracts. The Applicants indicate that they will file separately any contract terminations resulting from either of those negotiations.

purchase agreements and the power sales agreements with its nonaffiliated customers will continue to be honored in accordance with their terms whether or not they are reassigned to USGenNE.

The Applicants also claim that there will be no adverse effect on the Commission's regulatory authority because, after the transaction (and upon acceptance of its rate schedules), USGenNE will be subject to the Commission's jurisdiction. With respect to state regulation, they state that the Divestiture Transaction is subject to the review of four New England states in which NEES provides service (Massachusetts, Rhode Island, New Hampshire and Vermont). They also assert that state regulatory agencies in Massachusetts and Rhode Island (where the NEES Companies conduct 95 percent of their business) support the divestiture process, as evidenced by those states' execution of the Settlement Agreements.

C. The Commission's Evaluation of the Proposed Divestiture

1. Effect on Competition

In the Merger Policy Statement, the Commission adopted the DOJ and Federal Trade Commission (FTC) Horizontal Merger Guidelines (Guidelines) as the analytical framework for evaluating the effect of a proposed merger on competition.

With the exception of Norwood and Maine AG, no intervenor has claimed that the proposed transaction will have an adverse effect on competition.

Maine AG contends that NEPOOL may be too large to be considered as the relevant geographic market. Maine AG suggests that individual states and/or utilities may be more

appropriate as the geographic markets because not all states and utilities will begin retail competition on the same schedule. However, Maine AG takes no final position with regard to the Divestiture Transaction. Based on its own competitive analysis, Norwood alleges that the combination of the non-nuclear generating assets to be acquired from NEPCO with the uncommitted generation assets of USGenNE's affiliates will adversely affect competition.

The Applicants respond that Norwood's analysis is flawed because it inappropriately assumes the addition of uncertain capacity and power imports to New England (which are arbitrarily assigned to USGenNE) and ignores USGenNE's proposed transfer to TransCanada Pipelines of its interest in the Ocean State project. [13] According to the Applicants, once these flaws are corrected, Norwood's analysis confirms that the proposed transaction will not adversely affect competition.

We agree with the Applicants that the Divestiture Transaction will not adversely affect the market concentration levels in any relevant market. In fact, market concentration will likely decrease because NEPCO is not selling all of its generation (it is retaining a portion of its nuclear generating capacity entitlements and certain fossil generating units). In addition, because USGenNE currently does not own any generation, its purchase of the NEES' Companies' non-nuclear generating assets will not represent an increase in market concentration for USGenNE. Although USGenNE's affiliates own generation facilities within the NEPOOL and NYPP

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[13]In Docket No. EC98-18-000, USGenNE filed an application under section 203 of the FPA for authorization to transfer to certain TransCanada Pipeline affiliates the 20 percent ownership interest in Ocean State Power and related rights and obligations under various power sales agreements that USGenNE would acquire as part of the proposed Divestiture Transaction. That application is pending.

regions, almost all of the generating capacity is committed under long-term contracts, leaving only a de minimis amount of uncommitted capacity available for the short-term market. Consideration of that capacity does not significantly increase USGenNE's market concentration. With respect to installed capacity owned or controlled by USGenNE and its affiliates, the proposed transaction would not result in a change in market concentration that exceeds the thresholds established in the Merger Policy Statement.

Based on our analysis of the Applicants' market concentration analysis, we find that market concentrations will either not materially change or will decrease as a result of the proposed transaction. With regard to Maine AG's concerns, because we have found that the proposed transaction will either not materially change or will decrease market concentration, the size of the geographic market (i.e., whether it should be more narrow) is immaterial in this case.

Therefore, we conclude that the proposed Divestiture Transaction will not have an adverse effect on competition.

2. The Effect on Rates

The Merger Policy Statement explains that the protection of wholesale ratepayers and transmission customers is the Commission's primary concern regarding the effects of a section 203 transaction on rates. [14] The Merger Policy Statement also describes various commitments which may, in particular cases, be an acceptable means of protecting ratepayers, such as hold harmless provisions, open seasons for

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[14] See Merger Policy Statement at 30,123.

wholesale customers, rate freezes, and/or rate reductions. [15]

a. Reassignment of NEPCO's Wholesale Service Contracts

NEPCO has committed to continue providing service under its existing power supply agreements consistent with the current rates, terms and conditions of those contracts although some of the generating assets that currently "support" those contracts will be sold to USGenNE. [16] However, the Applicants indicate that they contemplate a future reassignment of NEPCO's current wholesale requirements and power sales agreements to USGenNE. Customer consent is required for NEPCO to reassign its contracts.

Several intervenors raise concerns regarding the potential reassignment of their power supply agreements from NEPCO to USGenNE. [17] The Massachusetts Municipals also request that the Commission clarify that contract issues such as reassignment and any effect on rates under the power supply agreements will be separately addressed in a future section 205 or 206 proceeding.

As NEPCO recognizes, the reassignment of its wholesale sales contracts in the future will require Commission approval under section 203 of the FPA, and intervenors' concerns can be raised when NEPCO files its section 203

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[15] Id. at 30,123-24.

[16] The Applicants explain that, while the ownership of the generating capacity used to provide service to customers under the power sales agreements may change hands, the same generating capacity will continue to be used to serve these customers.

[17] See Interventions of Massachusetts Municipals, NHEC, Pawtucket Power and Ogden.

application to reassign its wholesale sales contracts. Issues regarding contract reassignment or obligations under the power supply agreements may also be considered in section 205 or 206 proceedings before the Commission.

b. Issues Concerning NEPCO's Rate Freeze Proposal

Norwood, Merrimac and Groveland argue that they will be locked into wholesale rates that are no longer based on NEPCO's costs and may instead have to pay increased rates based on a NEPCO generation portfolio stripped of all but high-cost (nuclear and other) generation resources.

Norwood also alleges that NEPCO's proposed rate treatment, as it would apply to Norwood, i.e., a rate freeze offer, is inadequate because it would: (1) unfairly lock Norwood for over 10 years into rates for which the underlying cost of service has been eliminated (as a result of NEPCO's sale of its non-nuclear generating assets) and is patently anticompetitive and discriminatory; (2) deny Norwood access to alternative power resources that would allow Norwood to compete with NEPCO in the restructured electricity market; and (3) prevent Norwood from filing for a rate decrease under section 206 of the FPA. [18]

Norwood requests that, if the Commission does not order a hearing, it should alternatively order a mitigation condition

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[18]Under the Applicants' proposal, if a wholesale customer of NEPCO (such as Norwood) files a request for a rate decrease under section 206 of the FPA, NEPCO would then be entitled to apply for a proposed rate increase under section 205.

similar to that ordered in the FirstEnergy merger case [19] that would provide for a 90-day open season during which Norwood could terminate its contract with NEPCO and obtain replacement power elsewhere, but without the stranded cost conditions. [20]

Although the Applicants acknowledge that the generation portfolio upon which the existing rates are based will be different after the Divestiture Transaction, they note that, with NEPCO's rate freeze proposal, if NEPCO pays more for replacement power than it currently charges wholesale customers, NEPCO, not the customers, must bear the higher costs.

We believe that the rate freeze proposal adequately protects wholesale customers for the remainder of the terms of their respective contracts regardless of the generation portfolio used by NEPCO to provide service. Furthermore, Norwood and Merrimac and Groveland are not obligated to continue to take service from NEPCO after their respective contracts expire. The Applicants propose an open season to allow wholesale customers to terminate service early, provided they agree to pay a contract termination charge consistent with the terms and conditions of the Settlement Agreements.

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[19] See Ohio Edison Company, et al. 81 FERC ¶ 61,110 (1997) (FirstEnergy).

[20] Norwood cites the open season offer made to Pennsylvania Municipals in the FirstEnergy proceeding as the type of offer it would find acceptable. However, Norwood incorrectly claims that the Commission ordered an open season in that proceeding. Instead, the Commission accepted, as a condition of its authorization of the FirstEnergy merger, the voluntary offer by FirstEnergy of a 90-day open season for the Pennsylvania Municipals, which were the only wholesale customer group that had not previously reached a settlement with FirstEnergy concerning ratepayer protection issues.

Regarding Norwood's objection to the provision in the rate freeze proposal that would allow NEPCO to file for a rate increase in response to a section 206 rate decrease request by a wholesale customer, we believe that the rate freeze proposal, although not providing maximum protection to customers, is an acceptable ratepayer protection mechanism because it protects the customer from any adverse rate effect (i.e., a rate increase) resulting from the Divestiture Transaction or any other factor for the remainder of the term of the customer's contract.

c. Stranded Costs

Norwood argues that NEPCO has no basis to seek to assess Norwood stranded costs because Norwood receives transmission service from Boston Edison Company, not NEPCO.

We note that Norwood raised similar arguments with respect to the Settlement Agreements. As we found with regard to the Settlement Agreements, Norwood's argument is still premature. As we said in the Settlement Agreements Letter Order, until Norwood terminates its requirements service contract with NEPCO, it does not face any stranded cost charges. [21]

3. The Effect on Regulation

Merrimac and Groveland and Norwood claim that the transaction will significantly impair regulation or will create a regulatory gap because post-divestiture sales of power by NEPCO and USGenNE would be inadequately regulated.

We do not believe that the proposed sale and

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[21]Settlement Agreement Letter Order, slip op. at 2.

acquisition would impair this Commission's ability to regulate the transactions of the Applicants because: (1) wholesale sales and transmission service provided by NEES' subsidiaries will continue to be subject to Commission review; and (2) upon acceptance of its rate schedules, USGenNE will become a public utility and subject to the Commission's jurisdiction.

Similarly, the transaction wil not adversely affect state jurisdiction because, as the Applicants assert: (1) the transaction is subject to review in the four states in which the NEES Companies operate or own assets; and (2) the States of Rhode Island and Massachusetts, where NEES' operating subsidiaries conduct the majority of their business, support the proposed Divestiture Transaction. Further, no state commission has argued that the proposed Divestiture Transaction would impair state regulation.

4. Other Issues

Center for Social Issues expresses concerns about how USGenNE will operate the hydroelectric projects that NEPCO is transferring to USGenNE as part of the Divestiture Transaction. In addition, stating that it will pursue an issue of regional equity, Center for Social Issues also argues that the continued sale of project power outside of New Hampshire and Vermont will continue to cause economic disadvantages to the communities which bear the adverse environmental impacts of project operation. It further contends that a related concern is that divestiture may result in a substantial reduction in the payment of property taxes from the level presently being paid by NEPCO, which would contribute to reduced municipal services, employment and private property values. Center for Social Issues requests that the proposed transfer of hydroelectric licenses under section 8 of the FPA and the instant section 203 application be consolidated and set for hearing.

We will deny Center for Social Issues' request. As noted above, NEPCO's application to transfer of hydroelectric licenses to USGenNE pursuant to section 8 of the FPA will be addressed in a separate order. Besides being elements of NEPCO's divestiture of facilities, the two applications do not present common issues of law or fact warranting consolidation of the proceedings. Further, Center for Social Issues' concern about the potential impact of the Divestiture Transaction on the economic welfare of the affected communities is more appropriately addressed by the states in which the communities are located. [22]

III. The Applications for Market-Based Rates

The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. In order for a transmission-owning public utility or its affiliate to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing. [23]

As we explain below, we find that, with certain modifications, NEPCO's, AllEnergy's and USGenNE's market-based rate application meets these standards. Accordingly, we

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[22] See Merger Policy Statement at 30,128.

[23] E.g., Progress Power Marketing, Inc., 76 FERC ¶ 61,155 at 61,919 (1996), letter order approving settlement, 79 FERC ¶ 61,149 (1997); Northwest Power Marketing Company, L.L.C., 75 FERC ¶ 61,281 at 61,889 (1996); accord Heartland Energy Services, Inc., et al., 68 FERC ¶ 61,223 at 62,060-63 (1994) (Heartland).

will conditionally accept the proposed market-based rates for filing, to become effective, as requested by the Applicants, on the closing date of the Divestiture Transaction, which the Applicants expect to be July 1, 1998. [24]

A. Whether to Defer Action on USGen's Application

Several intervenors request that the Commission defer action on USGenNE's request for market-based rates until the Commission rules on NEPOOL's request for market-based rates in Docket No. ER97-1079-000, et al. Maine AG asserts that USGenNE will possess market power which must be mitigated and, therefore, must await the Commission's review of the pending NEPOOL market mitigation proposal. [25] The Rhode Island Commission and VDPS contend that analysis of the entire New England market is necessary for both USGenNE's and NEPOOL's market-based rate applications. Therefore, they request that action on this docket be deferred to allow further development of the NEPOOL market monitoring and mitigation measures, which they contend would moot the need to determine whether adequate support for market-based rates has been shown.

We believe that it is unnecessary to defer action on USGenNE's application for market-based rates pending our action in the NEPOOL proceeding. The analysis provided by the Applicants generally satisfies the Commission's requirements for market-based rates. Moreover, we have granted market-based rate authority to several other NEPOOL utilities without deferring action pending a NEPOOL-wide

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[24]Application, Testimony of Jennifer L. Kenney at 11.

[25]New Hampshire OCA supports Maine AG's position.

market power determination. [26]

B. Generation Market Power

The Applicants have performed a hub-and-spoke analysis that identifies NEPOOL as the relevant market. The Applicants state that treating NEPOOL as a single market is appropriate now that the NEPOOL-wide open access tariff is in place. Their analysis includes generation resources in NEPOOL, as well as long-term purchases from generation resources located in NYPP.

NEPCO's generation dominance analysis shows that, upon divestiture, NEPCO will retain 418 MW of installed capacity, which equals 1.6 percent of the NEPOOL market and will have no uncommitted capacity. AllEnergy neither owns nor controls any generation capacity. Therefore, its market share, for analytical purposes, as an affiliate of NEPCO, is equal to NEPCO's share. Finally, after divestiture, USGenNE will own 4,935 MW (5.0 percent of the NEPOOL market) of installed capacity and will have 113 MW of uncommitted capacity (8.2 percent of the NEPOOL market).

In support of its request for denial of USGenNE's application or a hearing, Maine AG argues that the Applicants' analysis does not account for transmission constraints, which causes the analysis to adopt too large a geographic market, which, in turn, dilutes USGenNE's market concentration. Instead, Maine AG argues that the Commission should

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[26] See, e.g., Boston Edison Company, 81 FERC ¶ 61,372 (1997); Central Maine Power Company, 80 FERC ¶ 61,246 (1997); Fitchburg Gas and Electric Company, 80 FERC ¶ 61,358 (1997); Indeck Pepperell Power Associates, Inc., 74 FERC ¶ 61,304 (1996); and Northeast Utilities Service Company, 74 FERC ¶ 61,135 (1996).

evaluate USGenNE's market power on the basis of the Merger Guidelines and that transmission constraints on NEPOOL ties with New York should be taken into account in determining whether market power exists.

We will deny Maine AG's request. The Commission has consistently held that the hub-and-spoke test is the appropriate test for analyzing market power in the context of requests for market-based rates and that the Merger Guidelines analysis need be submitted only if the applicant is unable to demonstrate a lack of generation dominance with the hub-and-spoke test. [27] Moreover, the Commission may revoke market-based rate authority if evidence is presented that generation market power problems exist. With respect to transmission constraints, even if all imports from New York are removed from USGenNE's study, USGenNE's shares of installed and uncommitted capacity are 19.6 percent and 10.2 percent, respectively; the Commission has found these market shares to be acceptable. [28]

Accordingly, we find that USGenNE meets the Commission's generation market power standard for approval of market-based rates.

C. Transmission Market Power

When a transmission-owning public utility or its affiliate seeks authorization to charge market-based rates, the

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[27] See, e.g., New York State Electric & Gas Corporation and XENERGY, Inc., 78 FERC ¶ 61,309 at 62,327-28 & n.5 and 62,329 n.7 (1997).

[28] See, e.g., Southwestern Public Service Company, 72 FERC ¶ 61,208 at 61,966-67 (1995), reh'g pending; Louisville Gas & Electric Company, 62 FERC ¶ 61,016 at 61,146 (1993) (LG&E).

Commission has required the public utility to have an open access transmission tariff on file before granting such authorization.[29] Several facts are noteworthy: AllEnergy neither owns nor controls any transmission facilities; NEPOOL filed an Independent System Operator (ISO) pool-wide open access transmission tariff in Docket No. ER97-1079-000, et al.; NEPCO filed a revised open access transmission tariff in Docket No. ER97-1327-000 to ensure that it would operate in tandem with the NEPOOL ISO Tariff; and USGenNE will neither own nor control any transmission facilities other than those necessary to interconnect its purchased generating resources with NEPCO. Further, pursuant to Order No. 888, USGenNE's only affiliate that owns or operates transmission facilities, PG&E, has filed an open-access transmission tariff in Docket No. OA96-28-000. For these reasons, we find that the Applicants meet the Commission's transmission market power standard for approval of market-based rates.

Green Mountain asserts that it relies on its rights to import power from sources outside of New England over transmission facilities interconnecting Vermont to New York. However, in the pending proceeding in Docket No. ER98-499-000 (concerning the Fourth Supplement to the NEPOOL Agreement), Green Mountain has alleged that NEPCO has claimed a right to use a portion of Green Mountain's share of those facilities for its own purposes. Green Mountain requests that the Commission condition its approval of market-based

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[29] See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,656-57 (1996) (Order No. 888), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997); accord Southern Company Services, Inc., et al., 71 FERC ¶ 61,392 at 62,536 (1995); Heartland, 68 FERC at 62,059-60.

rates for NEPCO on a requirement that NEPCO refrain from taking any action to impair the ability of Green Mountain to use those interconnections. As noted above, Green Mountain has raised these same concerns in the pending proceeding in Docket No. ER98-499-000. We see no reason, and Green Mountain offers none, why that issue cannot be adequately addressed in that proceeding. Accordingly, we deny Green Mountain's request.

D. Other Barriers to Entry/Reciprocal Dealing

NEPCO, AllEnergy, and USGenNE are affiliated with various intrastate natural gas pipelines. Should NEPCO, AllEnergy or USGenNE, or any of their affiliates deny, delay or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of NEPCO's, AllEnergy's, or USGenNE's authority to sell power at market-based rates. [30]

With this safeguard, we are satisfied with the Applicants' explanation that there are no other barriers to entry or reciprocal dealing considerations of concern here.

E. Affiliate Abuse

AllEnergy has included a code of conduct which provides that non-power goods and services sold by NEPCO to AllEnergy will be priced at the higher of cost or market and provides that non-power goods and services sold by AllEnergy to NEPCO will be priced no higher than market value. Moreover, the code of conduct prohibits NEPCO from sharing

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[30] See, e.g., LG&E, 62 FERC at 61,148.

market information with AllEnergy unless such information is already publicly available or simultaneously made publicly available, and separates the business activities and operating personnel of the affiliates. Accordingly, we are satisfied that there are no affiliate abuse considerations of concern presented by AllEnergy's application.

USGenNE's code of conduct fails to meet the Commission's affiliate abuse standards. USGenNE's code of conduct governing its relationship with PG&E prohibits PG&E employees from sharing market information with any USGenNE employee unless such information is comparably and contemporaneously made available to non-affiliated competitors of USGenNE. However, it further provides that "[t]his policy will not apply to market information known to be publicly-available or available to the recipient from a source not subject to this Policy." [31] Such a limitation is inappropriate, because the Commission has required that all shared market information be disclosed on a simultaneous basis. [32] Accordingly, we direct USGenNE to revise its code of conduct to provide that all shared market information be disclosed on a simultaneous basis.

In addition, while USGenNE's code of conduct provides that non-power goods and services sold by USGenNE to its affiliate PG&E will be priced at the higher of cost or market value and provides that non-power goods and services sold by USGenNE to PG&E will be priced no higher than market value, it also provides that "[t]he transfer of assets, goods or non-labor services with annual billings in excess of

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[31]USGenNE October 1, 1997 Market-Based Rate Application, Attachment H (Code of Conduct) at 2.

[32]UtiliCorp, 75 FERC ¶ 61,168 at 61,557 (1996), reh'g denied, 76 FERC ¶ 61,192.

$250,000 will be at fully-loaded cost." [33] The Commission has not imposed any dollar threshold for applying its requirement regarding the pricing of non-power goods and services, and USGenNE proffers no support for such a departure from our policy. Accordingly, we will direct USGenNE to revise its code of conduct to eliminate the $250,000 threshold.

With these revisions to USGenNE's code of conduct, we are satisfied that there are no affiliate abuse considerations of concern presented by USGenNE's application.

F. Waivers, Authorizations and Reporting Requirements

Consistent with procedures we have adopted in other cases, NEPCO and USGenNE may file umbrella service agreements for short-term power sales (one year or less) within 30 days of the date of commencement of short-term service, to be followed by quarterly transaction summaries of specific sales. For long-term transactions (longer than one year), NEPCO and USGenNE must submit the actual individual service agreement for each transaction within 30 days of the date of commencement of service. [34]

To ensure the clear identification of filings, and in order to facilitate the orderly maintenance of the Commission's files and public access to the documents, long-term transaction service agreements should not be filed together with short-term transaction summaries.

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[33]USGenNE October 1, 1997 Market-Based Rate Application, Attachment H (Code of Conduct) at 2.

[34]See, e.g., Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,444-45, clarified, 75 FERC ¶ 61,353 (1996); Plum Street Energy Marketing, Inc., et al., 76 FERC ¶ 61,319 at 62,556 (1996).

AllEnergy requests the following waivers and authorizations consistent with those granted to other power marketers with market-based authorization: (1) waiver of the filing requirements of Subparts B and C of Part 35, except sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) waiver of Parts 41, 101, and 141; (3) abbreviated filings with respect to interlocking directorates under Part 45; and (4) blanket authorization for issuances of securities or assumptions of liabilities pursuant to section 204 of the FPA, 16 U.S.C. § 824c (1994). We will grant the requested waivers and authorizations to the extent granted to other power marketers.

Consistent with previous Commission decisions, we will require AllEnergy to file quarterly reports detailing the purchase and sale transactions undertaken in the prior quarter. This requirement is necessary to ensure that contracts relating to rates and services are on file as required by section 205(c) of the FPA, 16 U.S.C. § 824d(c) (1994), and to allow the Commission to evaluate the reasonableness of the charges and to provide for ongoing monitoring of the marketer's ability to exercise market power. [35]

Additionally, we will direct NEPCO, USGenNE and AllEnergy to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These include, but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production,

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[35] See, e.g., Heartland, 68 FERC at 62,065-66.

or affiliation with any entity that has a franchised service area. [36] Alternatively, NEPCO, USGenNE and AllEnergy may elect to report such changes in conjunction with the updated market analysis it will be required to file every three years. [37]

IV. NEPCO's and USGenNE's Proposed Implementation Filings

A. Revisions to CTC Formula

In order to accommodate the introduction of retail competition programs in Massachusetts and Rhode Island, NEPCO filed the CTC to recover any of its generation-related costs that are not offset by the divestiture of its generation assets. These costs include NEPCO's investment in generating assets, costs associated with NEPCO's contractual commitments for purchased power and fuel transportation, and nuclear post-shutdown costs. The Commission accepted the proposed CTC formula for filing and set it for hearing, New England Power Company, 78 FERC ¶ 61,080 (1997), and later approved the Settlement Agreements. The Commission accepted a similar settlement between NEPCO and the Town of Littleton, New Hampshire (Littleton), New England Power Company, 81 FERC ¶ 61,334 (1997).

By the instant filing, NEPCO proposes to amend the CTC primarily to replace estimated revenues and costs with actual figures associated with the sale of generating assets to USGenNE. In addition, NEPCO made minor changes to the

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[36] See, e.g., Morgan Stanley Capital Group, 69 FERC ¶ 61,175 at 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Company, 68 FERC ¶ 61,248 at 62,134, clarified, 68 FERC ¶ 61,324 (1994).

[37] We reserve the right to require such an analysis at any time.

formula to, among other things, better levelize the CTC payments by adjusting the amortization period of certain fixed costs to prevent what would otherwise result in early recovery. Because the CTC formula contemplated the Divestiture Transaction and was included in the previously approved Settlement Agreements, and because the revisions here primarily update the formula to reflect the actual terms of the divestiture, we will accept the amended CTC formula for filing, without suspension or hearing.

B. USGenNE's Transitional Sales Service Agreements with Massachusetts Electric and Narragansett

Under the Massachusetts and Rhode Island restructuring programs, Massachusetts Electric and Narragansett will continue to provide power to retail customers who elect not to choose a supplier, low income customers who are unable to obtain or retain service from competitive suppliers, and retail customers temporarily between suppliers. Accordingly, these utilities continue to need a source of supply. Both state commissions required that the generating utilities offer service at prescribed maximum rates to ensure that, in the absence of competitive bids, retail customers would still receive power at reasonable rates. This default service, "Standard Offer Service," includes prescribed rates which, in the first years represent a rate decrease to the retail customers, but over time represent an increase. The rate increases are designed to encourage retail customers to seek competitive suppliers.

As part of the divestiture proceeding, USGenNE filed Standard Offer Service agreements to sell power for a transition period to Massachusetts Electric (1998-2004) and Narragansett (1998-2009) at the stated prices defined by the

Massachusetts and Rhode Island state commissions under their respective retail restructuring programs. The agreements are designed to replace NEPCO's identical agreements with Massachusetts Electric and Narragansett which were accepted in Docket Nos. ER97-678-000 and ER97-680-000. USGenNE's agreements note that Massachusetts Electric and Narragansett are not required to purchase power from USGenNE when lower priced alternatives are available. USGenNE seeks approval of these agreements under its market-based rate tariff.

Norwood asserts that NEPCO's proposal to transfer its obligations to USGenNE to provide Standard Offer Service to NEPCO's affiliates will seriously damage or destroy market-based competition in New England. In this regard, Norwood alleges that the standard offer rates are higher than current wholesale rates and are not cost-based.

Norwood is correct that the rates are not based on USGenNE's costs; however, USGenNE is seeking approval of these rates under its market-based rate proposal. Moreover, the rates in these agreements simply permit USGenNE to step into the shoes of NEPCO for purposes of selling power at the Standard Offer Service rates which the Commission has previously accepted for filing in Docket Nos. ER97-678-000 and ER97-680-000. The proposed agreements maintain the status quo and do not change, let alone seriously damage or destroy, market-based competition in New England. Accordingly, we will accept the agreements for filing.

C. NEPCO's Nuclear Wholesale Power Agreement

NEPCO and USGenNE have entered into an agreement under which NEPCO will sell power and energy from its nuclear units to USGenNE for the same transition period

defined in the standard offer service agreements described above. [38] The service will be priced at the lower of (1) the sum of the NEPOOL market price for specified capacity and energy products [39] or (2) prices equal to the prices that USGenNE will be charging Massachusetts Electric and Narragansett for the Standard Offer Service. NEPCO seeks approval of these agreements under its request for market-based rates discussed above. [40] We note that the sales contract and, of course, the price, were specifically included in the RFP and therefore, were part of the competitive bid price. Because this arrangement simply implements one component of the RFP, we will accept the proposed agreement for filing.

D. Continuing Site/Interconnection Agreement (S/I Agreement)

NEPCO's S/I Agreement primarily addresses interconnection and operational matters that arise as a result of NEPCO's sale of certain generating assets to USGenNE. It governs the rights and obligations of USGenNE, as purchaser of the generating units, and NEPCO, as owner and operator of the transmission system to which the generating units are interconnected. The proposed agreement primarily addresses NEPCO's interconnection of the generating facilities to its pool transmission facilities (PTF) and the payment, under a formula

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[38]USGenNE states that it has the option (but not an obligation) to make such purchases.

[39]NEPOOL's application to operate spot markets for these products is pending before the Commission. New England Power Pool, Docket Nos. OA97-237-000, ER97-1079-000 and EC97-35-000.

[40]NEPCO states that its application for market-based pricing will not apply to existing contracts with its wholesale customers. NEPCO states that those contracts are subject to the rate freeze it has proposed through its section 203 divestiture application.

charge contained in its open access transmission tariff, by USGenNE for the interconnection. The agreement also addresses site access, building services and related operational matters. Finally, NEPCO discloses that USGenNE is obligated to operate its generating units within specified voltage levels which may be modified by NEPCO or the New England Independent System Operator (ISO). If NEPCO requires USGenNE to provide reactive power, the service will be provided at the rates contained in NEPOOL's proposal to compensate reactive power providers in Docket Nos. OA97-608-000 and ER97-3574-000. If that proposal is still pending at the time service commences, USGenNE commits to make a separate filing under section 205 of the FPA.

Under the S/I Agreement, NEPCO will assess an annual facilities charge that is determined by a formula rate which is identical to the annual facilities charge formula filed in NEPCO's open access transmission tariff in Docket No. OA96-74-000, which has been set for hearing. Accordingly, we will require NEPCO to include these charges in the service agreement filed to place this transmission service under NEPCO's open access transmission tariff.

NUSCO is concerned that the proposed S/I Agreement may result in inadvertent energy flows over the Northeast Utilities system. However, NUSCO does not proffer any arguments or evidence to substantiate its claim. Accordingly, we will accept NEPCO's proposed S/I Agreement for filing, subject to the requirement describe above.

E. Resale of IPP Power

NEPCO is obligated to purchase long-term power from a number of independent power producers (IPPs) and utilities under contracts containing rates that are currently above market levels. As part of the Divestiture Transaction, USGenNE

agreed to purchase this power from NEPCO at a price below the contract rates. Thus, NEPCO's customers would be relieved of a substantial portion of what would otherwise be stranded costs.

Pawtucket Power and Ogden complain that NEPCO is prohibited under its purchase power agreements from transferring or assigning its rights and obligations to USGenNE without Pawtucket Power's written consent. However, NEPCO would not be transferring its purchase contracts to USGenNE. Rather, NEPCO would merely be reselling the power to USGenNE. NEPCO would remain the purchaser under the contracts. Consequently, the intervenors' protests are misplaced. Further, NEPCO's sale of this power is consistent with the overall disposition of its generation resources. Accordingly, we will accept the agreement for filing.

F. NEPCO's Transfer to USGenNE of Its Transmission Use Rights under the Hydro-Quebec Interconnection Agreement

As part of the Divestiture Transaction, NEPCO indicates that it is transferring its rights to transmission capacity on Hydro-Quebec's Phase I and Phase II interconnections [41] to USGenNE to allow USGenNE to take delivery of energy it purchases from Hydro-Quebec.

The application stated that NEPCO requests approval of the proposed transfer pursuant to section 205 of the FPA. However, the proposed transfer involves the transfer of control over NEPCO's jurisdictional facilities from NEPCO to

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[41]The Phase I and Phase II interconnections consist of those transmission facilities connecting Hydro-Quebec and New England in the States of Vermont, New Hampshire and Massachusetts.

USGenNE and, thus, requires Commission approval pursuant to section 203 of the FPA. Accordingly, we will reject the proposed transfer of NEPCO's rights and obligations under the Hydro-Quebec Agreement, without prejudice to the Applicants refiling an application pursuant to section 203 of the FPA. [42]

G. Proposed Modifications to NEPCO's Open Access Transmission Tariff

The Commission has accepted for filing the NEPOOL open access transmission tariff [43] and the related NEPCO open access transmission tariff. [44] NEPCO's open access transmission tariff was revised in Docket No. ER97-1327-000 to work in tandem with the NEPOOL open access tariff. Both the NEPOOL and revised NEPCO tariffs were made effective, subject to refund, pending further Commission orders.

The proposed revisions are intended to reflect changes to NEPCO's operations as a result of the divestiture. In addition, NEPCO proposes to revise the charge for the only point-to-point service which is now governed by the NEPCO tariff, i.e., transmission from a generator interconnected with NEPCO's non-PTF facilities to the NEPOOL PTF grid. Under the present tariff, the point-to-point charge is the higher of incremental or embedded cost. Under the proposed modification, the incremental cost charge will be billed

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[42] In view of our determination, it would be premature to address NUSCO's arguments at this time. NUSCO may reiterate its concerns, if necessary, when the Applicants make a section 203 application.

[43] See Mid-Continent Area Power Pool, et al., 78 FERC ¶ 61,203 (1997).

[44] See Bangor Hydro-Electric Company, et al., 78 FERC ¶ 61,258, clarified, 80 FERC ¶ 61,143 (1997).

whether higher or lower than the embedded cost. One aspect of the NEPOOL restructuring is a transition plan which continues service under agreements in existence prior to the filing of the NEPOOL tariff. NEPCO proposes to reduce the charges in those agreements to the extent necessary to reflect this same type of pricing.

Because NEPCO's proposed tariff modifications adopt the same provisions that are subject to further orders in the NEPOOL proceedings in Docket Nos. OA97-237-000 and ER97-1327-000, we will accept NEPCO's proposed modifications to its open access transmission tariff for filing, and suspend them for a nominal period, and make them subject to refund, and subject to the issuance of further orders in Docket Nos. OA97-237-000 and ER97-1327-000.

Our preliminary analysis indicates that NEPCO's proposed modifications to its open access transmission tariffs have not been shown to be just and reasonable, and may be unjust, unreasonable or unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed modifications for filing, and suspend them for a nominal period, subject to refund, and subject to further orders in the NEPOOL restructuring proceedings.

The Commission orders:

(A) The proposed sale of the NEES Companies jurisdictional facilities is hereby approved.

(B) The Commission retains authority under section 203(b) of the FPA to issue supplemental orders as appropriate.

(C) The foregoing authorization is without prejudice to the authority of this Commission or any other regulatory body

with respect to rates, service, accounts, valuation, estimate, determinations of cost, or any other matter whatsoever now pending or which may come before this Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Applicants are hereby directed to promptly notify the Commission when the sale of jurisdictional facilities is effectuated.

(F) USGenNE is hereby directed to file, within 30 days of the date of this order, a revised code of conduct reflecting the discussion in the body of this order.

(G) USGenNE's market-based power sales rate schedules are hereby conditionally accepted for filing, without suspension or hearing, to become effective upon the closing date of the Divestiture Transaction, as requested, on the condition that USGenNE makes the compliance filing directed in ordering Paragraph (F) above.

(H) NEPCO's, AllEnergy's market-based power sales rate schedules are hereby accepted for filing, without suspension or hearing, to become effective upon the closing date of the Divestiture Transaction, as requested.

(I) AllEnergy's request for waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted.

(J) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by AllEnergy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888

First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § § 385.211 and 385.214.

(K) Absent a request to be heard within the period set forth in Ordering Paragraph (J) above, AllEnergy is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of AllEnergy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(L) Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving AllEnergy. Any such person instead shall file a sworn application providing the following information:

(1) full name and business address; and

(2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(M) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of AllEnergy's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(N) AllEnergy's request for waiver of the provisions

of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(O) NEPCO, AllEnergy and USGenNE are each hereby directed to conform to the filing and reporting requirements specified in this order. The first quarterly reports of transactions undertaken by NEPCO, AllEnergy and USGenNE under their market-based power sales rate schedules will be due within 30 days of the calendar quarter ending June 30, 1998.

(P) NEPCO, AllEnergy and USGenNE are each hereby directed to file an updated market analysis within three years of the date of this order, and every three years thereafter.

(Q) NEPCO, AllEnergy and USGenNE are hereby directed to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. Alternatively, as discussed in the body of this order, they may elect to report any such changes every three years with the updated market analysis filed pursuant to Ordering Paragraph (P) above. NEPCO, AllEnergy and USGenNE each shall notify the Commission of which option it elects in the first quarterly report filed pursuant to Ordering Paragraph (O) above.

(R) NEPCO's and USGenNE's proposed implementation agreements, except for those addressed in Ordering Paragraphs (S) through (U) herein, are hereby accepted for filing, without suspension or hearing, to become effective on the closing date of the Divestiture Transaction, as requested.

(S) The S/I Agreement is hereby conditionally

accepted for filing without suspension or hearing, to become effective on the closing date of the Divestiture Transaction, as requested, subject to the modifications discussed in the body of this order. NEPCO shall file the modifications to the S/I Agreement within 30 days of the date of this order.

(T) NEPCO's proposed agreement to transfer its rights and obligations to USGenNE under the Hydro-Quebec Agreement is hereby rejected, without prejudice to refiling under section 203 of the FPA, as discussed in the body of this order.

(U) NEPCO's proposed modifications to its open access transmission tariff are hereby conditionally accepted for filing and suspended for a nominal period, to become effective on the closing date of the Divestiture Transaction, subject to refund and subject to further orders, as discussed in the body of this order.

(V) NEPCO, AllEnergy and USGenNE are hereby informed of the following rate schedule designations shown on the Attachment.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Acting Secretary.

UNITED STATES OF AMERICA 83 FERC ¶ 61,275
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

New England Power Company,)
Narragansett Electric Company,) Docket Nos. ER98-6-001
AllEnergy Marketing Co., LLC) and EC98-1-001
and USGen New England, Inc.)

ORDER ON CLARIFICATION AND REHEARING

(Issued June 10, 1998)

In this order, we provide clarification of, and deny in part and dismiss as moot in part requests for rehearing of, the Commission's order issued on February 25, 1998 in this proceeding. New England Power Company, et al., 82 FERC ¶ 61,179 (1998) (February 25 Order).

Background

In the February 25 Order, the Commission approved an application under section 203 of the Federal Power Act (FPA) by New England Power Company (NEPCO) and Narragansett Electric Company (Narragansett) (jointly, the NEES Companies) and USGen New England, Inc. (USGenNE) (collectively, the Applicants) for authorization of the proposed disposition by the NEES Companies of certain jurisdictional facilities as part of the sale of substantially all of their non-nuclear generation assets to USGenNE (Divestiture Transaction). The order also conditionally accepted for filing

USGenNE's proposed market-based rates, accepted for filing the proposed market-based rates of NEPCO and AllEnergy Marketing Company, Inc. (AllEnergy), and conditionally accepted for filing certain proposed agreements and amendments to existing rates proposed by NEPCO and USGenNE.

USGenNE filed a timely request for clarification or, in the alternative, rehearing. Timely requests for rehearing were also filed by: the Vermont Department of Public Service, the Maine Attorney General, and the New Hampshire Office of the Consumer Advocate (collectively, State Intervenors); the Northeast Center for Social Issue Studies (Center for Social Issues); Ogden Haverhill Associates (Ogden); and the Town of Norwood, Massachusetts (Norwood).

On April 10, 1998, the NEES Companies filed a motion to answer Norwood's request for rehearing. [1]

Discussion

A. USGenNE's Request for Clarification or, in the Alternative, Rehearing

The February 25 Order conditionally granted USGenNE's application for authority to sell power at wholesale at market-based rates. [2] However, USGenNE points out that the ordering paragraphs are silent with respect to USGenNE's request for the waivers and blanket authorizations generally afforded power marketers and its request that we determine

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[1]We will deny the motion. Under our regulations, answers to requests for rehearing generally are not permitted. 18 C.F.R. § 385.213 (1997).

[2]82 FERC at 61,661 & Ordering Paragraph (G).

that funds received in connection with power sales are not "facilities" within the meaning of section 203 of the FPA and that sales of accounts receivable do not constitute the disposition of jurisdictional facilities under section 203. USGenNE seeks clarification that the Commission intended to grant USGenNE the requested waivers and blanket authorizations.

USGenNE also states that it is not clear from the February 25 Order whether the Commission approved its proposal to sell NEPCO reactive power at the formula rates filed by NEPOOL, as those rates may be changed from time to time. [3] It states that the Site/Interconnection Agreement between NEPCO and USGenNE authorizes NEPCO to pay USGenNE for reactive power at the prevailing market rate. It requests clarification that until market-based rates are available for reactive power, the prevailing market rate consists of the Commission-approved NEPOOL rates for reactive power, as those rates may be changed from time to time. [4]

USGenNE also asserts that its market-based rate application "implicitly encompassed" a request for authority to charge market-based rates for ancillary services. It asks for clarification that it may charge market-based rates for ancillary services.

USGenNE also requests clarification that its market-based rate schedule has been deemed to be amended by

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[3]USGenNE made this proposal in its Petition for Order Accepting Rates for Filing and Waiving Regulations (USGenNE's Petition) at 21 & n.30.

[4]If the Commission declines to grant the requested clarifications concerning waivers and blanket authorizations and reactive power, then, in the alternative, USGenNE requests rehearing on those issues.

operation of the Commission's order in Enron Power Marketing, Inc., 81 FERC ¶ 61,277 at 62,361 (1997) (Enron Power), to provide for reassignment of transmission capacity. USGenNE states that its market-based rate application was pending at the time the Commission issued Enron Power and that it is not clear whether USGenNE thus had an "existing rate schedule" that was automatically amended by operation of Enron Power.

1. Request for Waivers and Blanket Authorizations

The February 25 Order inadvertently did not include USGenNE's name in Ordering Paragraphs (I) through (N), in which the Commission granted to AllEnergy the waivers and blanket authorizations generally afforded to power marketers. Accordingly, we clarify that USGenNE's request for such waivers and blanket authorizations was granted, and Ordering Paragraphs (I) through (N) of the February 25 Order apply to grant such waivers and blanket authorizations to USGenNE. [5]

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[5]USGenNE also requests specific Commission assurance that the funds received in connection with power sales are not "facilities" within the meaning of FPA section 203 and that sales of accounts receivable do not constitute dispositions of jurisdictional facilities under FPA section 203. We previously have explained that sales of accounts receivable are not dispositions of jurisdictional facilities and are not within the scope of FPA section 203. Origen Generating Corporation, 83 FERC ¶ 61,250 (1998); WKE Station Two, Inc., 82 FERC ¶ 61,178 at 61,653 n.7 (1998); Millenium Partners, L.P., 82 FERC ¶ 61,024 at 61,074 n.8 (1998); Cataula Generating Company, L.P., 79 FERC ¶ 61,261 at 61,077 n.27 (1997). To the extent USGenNE seeks a case-specific finding on this or any related point, it may file a petition for declaratory order.

2. Authorized Charge to USGenNE for Reactive Power

We will grant clarification that USGenNE is authorized to charge NEPCO for reactive power at the Commission-approved NEPOOL rates for reactive power, as those rates may be changed from time to time.

3. Market-Based Rates for Ancillary Services

We will deny the request for clarification that the order authorized USGenNE to charge market-based rates for ancillary services. The Commission has determined that requests for market-based rates for ancillary services must include a market analysis that separately addresses the nature and characteristics of each ancillary service, as well as the nature and characteristics of generation capable of supplying each service, and must develop a market share for each service. [6] USGenNE's application did not include an express request for market-based rates for ancillary services, much less the required support for such a request.

4. Reassignment of Transmission Capacity

We clarify that our determination in Enron Power that all power marketers' existing rate schedules would be amended regarding the reassignment of transmission capacity applies to USGenNE's market-based rate schedule, which was pending before the Commission when we issued Enron Power.

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[6] Long Beach Generation, LLC, 82 FERC ¶ 61,295 at 62,155 (1998); El Segundo Power, LLC, 82 FERC ¶ 61,126 at 61,453 (1998); Ocean Vista Power Generation, LLC, 82 FERC ¶ 61,114 at 61,406-407 (1998).

B. State Intervenors' Request for Rehearing

State Intervenors object to the Commission's determination that it was unnecessary to defer acting on USGenNE's market-based rate proposal pending the outcome of the proceeding concerning the New England Power Pool's (NEPOOL) request for market-based rates, Docket No. ER97-1079-000, et al. (NEPOOL market-based rate proceeding). We refused to defer action because the analysis submitted by the Applicants generally satisfies our requirements for market-based rates. [7] On rehearing, State Intervenors reiterate their arguments that exclusive reliance on market share data under the hub-and-spoke analysis for market dominance does not account for transmission constraints that create market concentration in intra-NEPOOL load pockets and the highly concentrated nature of the generation market in New England. They state that those factors underlie the concerns that led NEPOOL, the NEPOOL ISO, and the New England Conference of Public Utility Commissioners to negotiate the market power monitoring and mitigation measures that are at issue in the NEPOOL market-based rate proceeding, and that USGenNE's application for market-based rates relies, in part, on those market power monitoring and mitigation measures. Because the monitoring and mitigation measures are not yet approved, State Intervenors believe that approval of USGenNE's application for market-based rate authority should be conditioned on the outcome of NEPOOL's market-based rate proceeding.

We will deny rehearing. We fully addressed State Intervenors' concerns on this issue in the February 25 Order, and State Intervenors have presented no new arguments that

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[7] 82 FERC at 61,661.

warrant changing our determination. We reiterate that it has been our practice to grant market-based rate authority to NEPOOL utilities without deferring action pending a NEPOOL-wide market power determination. [8] State Intervenors have not given us a reason to act otherwise in this proceeding.

State Intervenors also object to the Commission accepting NEPCO's proposed changes to its open access tariff subject to the outcome of the proceeding in Docket Nos. OA97-237, et al. (NEPOOL open access tariff proceeding). [9] They suggest that in finding that NEPCO's proposed tariff modifications adopt the same provisions that are at issue in the NEPOOL open access tariff proceeding, the Commission misconstrued NEPCO's proposal. They claim that there is no nexus between NEPCO's proposed modifications and the NEPOOL open access tariff proposal (which, they claim, is already overly complex) that would justify this linkage. [10]

First, contrary to State Intervenors' assertions, we did not misconstrue the nature of NEPCO's proposal. Therefore, we reject their claim that there is no nexus between NEPCO's proposed modifications and the NEPOOL open access tariff proceeding. On the contrary, as we earlier determined, the proposed tariff modifications adopt the same provisions that are at issue in the NEPOOL open access tariff proceeding. Second, we did not consolidate NEPCO's open access tariff with the hearing in the NEPOOL open access tariff proceeding. Rather, we only made the former subject to the outcome of the latter, in light of their relationship. Therefore, the complexity

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[8] Id. at 61,661 & n.26.

[9] Id. at 61,666.

[10] State Intervenors Rehearing at 5.

of the pending NEPOOL open access tariff proceeding has no bearing on our determination and will not prejudice State Intervenors.

C. Ogden's Rehearing

The February 25 Order noted that NEPCO is obligated to purchase long-term power from a number of independent power producers and utilities under contracts that are currently above market levels. As part of the Divestiture Transaction, USGenNE agreed to purchase this power from NEPCO at a price below the contract rates. The February 25 Order determined, inter alia, that NEPCO would merely be reselling the power to USGenNE and that NEPCO would remain the purchaser under the contracts. [11] On rehearing, Ogden [12] reiterates its argument that, with the exception of NEPCO's continuing responsibility for interconnecting Ogden's generating facility to NEPCO's transmission system and continuing liability for payments, NEPCO has, without the required consent of Ogden, reassigned its rights and obligations under the Power Purchase Agreement (PPA) between Ogden and NEPCO. [13] Ogden also argues that it was inconsistent for the Commission to find that NEPCO must obtain approval under section 203, rather than under section 205, of the reassignment of its transmission use rights under NEPCO's

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[11]82 FERC at 61,666.

[12]Ogden owns a qualifying facility (QF) with a power production capacity in excess of 30 MW; NEPCO is required to purchase the QF's power.

[13]The Commission accepted the PPA for filing by letter order dated April 28, 1987. Ogden Haverhill Associates, Docket No. ER87-76-001.

Interconnection Agreement with Hydro Quebec, [14] without making a similar finding with respect to the reassignment of the PPA. It requests that the Commission require NEPCO to first obtain Ogden's consent to the reassignment, then file an application under section 203 of the FPA for approval of the reassignment of its PPA with NEPCO.

We will deny rehearing and respond to what appears to be Ogden's misunderstanding of the Commission's section 203 jurisdiction. Ogden's argument on rehearing simply reiterates its earlier protest, which the February 25 Order found to be misplaced. USGenNE's application noted that USGenNE and NEPCO would use all reasonable efforts to assign NEPCO's power purchase rights to USGenNE. [15] However, to our knowledge, no such reassignment has occurred because NEPCO remains obligated to purchase from Ogden. The fact that NEPCO will be reselling the purchased power to USGenNE does not change its rights and obligations under the PPA. The February 25 Order did not grant NEPCO authority to assign any of its contract rights or obligations to purchase power from Ogden and, indeed, no such authority could have been given. This is because, as discussed below, a section 203 authorization was not required as there was no proposed disposition of jurisdictional facilities involving the PPAs. Rather, the proposed Transfer Agreement was properly submitted as a rate filing under section 205 of the FPA involving the sale by NEPCO of electricity (that NEPCO purchases from Ogden) to USGenNE for resale by

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[14] See 82 FERC at 61,666. In Docket No. EC98-35-000, USGenNE and NEPCO filed a section 203 application, which is currently pending before the Commission.

[15] USGenNE's Petition at 15-16.

USGenNE.[16]

We reject Ogden's argument that if NEPCO were to assign its purchase rights under the PPA to USGenNE, that would constitute a disposition of jurisdictional facilities for which NEPCO must obtain prior approval under section 203 of the FPA. Section 203 of the FPA applies to dispositions, acquisitions, and mergers of jurisdictional facilities. Jurisdictional facilities, in turn, are described in section 201 of the FPA, which provides that the Commission shall have jurisdiction over facilities for transmission in interstate commerce and sales of electric energy at wholesale in interstate commerce. [17] Because a right to purchase power under a contract is not a facility used for the transmission of electric energy or for the sale of electric energy at wholesale, the transfer (disposition) of such a purchase right is not subject to section 203 authorization. [18]

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[16]To the degree that Ogden believes that NEPCO has violated a term or condition of the PPA, it may file a complaint under section 206 of the FPA.

[17]16 U.S.C. § 824 (1994). Section 201 further provides that the Commission shall not have jurisdiction, except as specifically provided, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. 16 U.S.C. § 824 (b)(1) (1994).

[18]In contrast, in prior cases, the Commission has determined that a contract or rate schedule for the sale for resale of electric energy in interstate commerce is a jurisdictional "facility" within the meaning of section 201 because it is the instrument by which an entity engages in jurisdictional sales for resale, and the transfer (disposition) of such a contract by a public utility (or the acquisition of such a contract by a public utility) requires section 203 approval. See, e.g., Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 & n.7 (1993), order on

(continued...)

D. Center for Social Issues Studies' Rehearing

The February 25 Order denied Center for Social Issues Studies' request to consolidate the Divestiture Transaction with NEPCO's application under section 8 of the FPA [19] to transfer hydroelectric licenses to USGenNE and set them for hearing for purposes of investigating alleged adverse environmental impacts of USGenNE's operations of the hydroelectric projects. [20] The Commission found that the two proceedings did not present common issues of fact and law. The Commission further found that the Center's concerns with respect to the potential impact of the Divestiture Transaction on the economic welfare of the affected communities is more appropriately addressed by the states in which the communities are located. [21]

On rehearing, Center for Social Issues Studies argues that the Commission's approval of the Divestiture Transaction application included approval of NEPCO's property tax treaties which might limit the scope of review by Vermont or any other affected states. It asserts that NEPCO's divestiture of its hydropower projects in Vermont and New Hampshire may

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[18](...continued)
clarification and reh'g, 66 FERC ¶ 61,244 (1994) (Enron).

[19]16 U.S.C. § 801 (1994).

[20]In a separate order, the Commission approved the transfer of hydro licenses. New England Power Company, et al., 82 FERC ¶ 62,138, reh'g denied, 83 FERC ¶ _____ (1998). Center for Social Issues Studies also requested consolidation in that proceeding. In a separate order being issued concurrently with the instant order, the Commission is denying rehearing in the hydroelectric license transfer case.

[21]82 FERC at 61,661.

reduce the book values of those facilities, resulting in reduced property tax payments to communities in those states. It argues that the Commission must consider how the sale will impact the economic welfare of those communities and whether to impose conditions to mitigate that impact. It also contends that the Commission failed to consider potential environmental impacts caused by USGenNE's operation of the hydropower projects.

1. Economic Impact Related to Property Taxes

We will deny rehearing with respect to the alleged economic impact on the affected communities. The February 25 Order did not approve any proposed action by NEPCO with regard to property tax treaties. Property tax treaties do not constitute facilities that are utilized in connection with a public utility's jurisdictional sales of electricity and therefore are not jurisdictional facilities. Thus, their transfer does not constitute a disposition of jurisdictional facilities requiring Commission approval under section 203 of the FPA. [22] Consequently, this is not a matter that we would consider, pursuant to the Merger Policy Statement, [23] in evaluating an application under section 203. The section 203 application, and our approval of the application, concerned only the proposed disposition of the NEES Companies' jurisdictional facilities. [24]

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[22]Enron, 65 FERC at 62,405.

[23]Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, III FERC Stats. and Regs. ¶ 31,044 (1996), order on reconsideration, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement).

[24]See Section 203 Application at 28-33 (description of facilities to be sold).

Center for Social Issues Studies also argues that the Commission is obligated to consider under the "public interest" standard of section 203 the impact of the Divestiture Transaction on the economic welfare of the affected communities. We disagree. The Merger Policy Statement [25] states that the Commission will principally look at three factors in evaluating applications under section 203: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. [26] The Merger Policy Statement further states that "if appropriate, we will consider other matters that are under our jurisdiction." [27] However, as we concluded in the February 25 Order, the impact on the economic welfare of the affected communities is a matter more appropriately addressed by the states in which the communities are located. [28] Nothing raised on rehearing persuades us to the contrary.

2. Alleged Environmental Impacts

We will deny rehearing of our decision not to set for hearing the issue of alleged environmental impacts and not to

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[25]Center for Social Issues Studies suggests that the Merger Policy Statement is inapplicable to the instant case because the applicants are not merging and the Merger Policy Statement only addresses mergers. See Merger Policy Statement, FERC Stats. & Regs. at 30,113 n.8.

Even though the Merger Policy Statement focused on mergers, the Commission has applied the principles and policies expressed therein to section 203 applications involving sales of jurisdictional facilities. E.g., Long Island Lighting Company, 82 FERC ¶ 61,129 (1998); Boston Edison Company, 82 FERC ¶ 61,311 (1998).

[26]Merger Policy Statement, FERC Stats. & Regs. at 30,111.

[27]Id. at 30,128.

[28]82 FERC at 61,661.

consolidate this proceeding with the proceeding concerning the transfer of NEPCO's hydroelectric licenses to USGenNE. Under section 380.4(a) of the Commission's regulations, [29] neither an environmental assessment nor an environmental impact statement is required for Commission approval of the acquisition or disposition of property under section 203 of the FPA. This "categorical exclusion" applies unless persuasive evidence of unusual circumstances warranting an environmental study is presented. [30] Center for Social Issues Studies has not presented such evidence. It merely speculates that, because USGenNE has not previously operated hydropower projects, USGenNE's operation of the projects that it will acquire could cause adverse environmental impacts. [31] Further, since it has failed to make a threshold evidentiary showing, its arguments asserting that the Commission failed to institute proper procedures (i.e., the preparation of an environmental study, setting the issue for hearing and consolidation with the hydro license transfer proceeding) are moot.

E. Norwood's Rehearing

On rehearing, Norwood argues that: the Commission should have reviewed the section 203 application together with certain offers of settlement between NEPCO and its distribution company affiliates in Docket Nos. ER97-678-000

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[29] 18 C.F.R. § 380.4(a) (1997).

[30] Wisconsin Electric Power Company, et al., 79 FERC ¶ 61,158 at 61,742-43 (1997); Public Service Company of Colorado and Southwestern Public Service Company, 75 FERC ¶ 61,325 at 62,047; Merger Policy Statement, FERC Stats. and Regs. at 30,128.

[31] See Center for Social Issues Studies Request for Rehearing at 7.

and ER97-680-000; [32] the Commission should have ordered a hearing regarding the effect of the Divestiture Transaction on competition; the Commission erred in not rejecting the rates under the Standard Offer Service agreements being transferred from NEPCO to USGenNE; and the Commission improperly froze Norwood's rates for 10 years.

1. Approval of Settlements in Docket Nos. ER97-678-000 and ER97-680-000

Norwood asserts that in approving the settlements at issue in Docket Nos. ER97-678-000 and ER97-680-000, the Commission essentially prejudged the Divestiture Transaction, thus negating any meaningful review of the application under section 203.

We will deny rehearing. First, we will not revisit the merits of the settlement proceeding herein. Norwood's arguments with regard to those settlements were addressed in Docket Nos. ER97-678-000 and ER97-680-000. Second, our approval of the settlements between NEPCO and its distribution company affiliates did not prejudge the Divestiture Transaction, nor was the February 25 Order's analysis dependent on the Commission's approval of the settlements. As we explained previously, the settlements expressly state that the Divestiture Transaction is subject to separate regulatory

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[32]The Commission conditionally approved the settlements by letter order issued on November 26, 1997. New England Power Company, Docket Nos. ER97-678-000 and ER97-679-000 (unpublished) (1997), order denying reh'g, 83 FERC ¶ 61,265 (1998) (NEPCO Rehearing Order). Like the instant proceeding, those proceedings arose out of the NEES Companies' comprehensive restructuring in preparation for the introduction of retail competition programs in Rhode Island and Massachusetts.

approval. [33] Lastly, Norwood's claim that the two matters should be heard together is mooted by the Commission's approval of the settlements.

2. Request for a Hearing

We will deny rehearing of Norwood's request that the Commission conduct a hearing on the effect of the Divestiture Transaction on competition. The fact that Norwood disagrees with the Commission's market power analysis does not constitute a factual issue warranting an evidentiary hearing.

3. Rates under Transitional Sales Service Agreements

As part of the proposed Divestiture Transaction, USGenNE will assume NEPCO's obligations under Standard Offer Service agreements to sell power for a transition period to NEPCO's distribution company affiliates, Massachusetts Electric Company (Mass Electric) and Narragansett, and USGenNE will charge the same rates as NEPCO would have charged. Those agreements would replace NEPCO's identical agreements with the two utilities. [34] The February 25 Order approved those agreements, finding that they maintain the status quo and rejecting Norwood's argument that the agreements would harm market-based competition in New England.

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[33] NEPCO Rehearing Order, 83 FERC at _____, slip op. at n.21.

[34] USGenNE's Petition at 17-19. USGenNE stated that the specific Standard Offer Service prices were agreed to in settlement with Massachusetts and Rhode Island.

On rehearing, Norwood again complains that the Standard Offer prices are not based on USGenNE's costs and maintains that allowing USGenNE to recover the Standard Offer rates is inconsistent with the Commission's goal that competitive markets should determine wholesale prices and would harm competition in New England.

We will deny rehearing. As we noted in the February 25 Order, under USGenNE's Standard Offer Service agreements, Mass Electric and Narragansett are not required to purchase power from USGenNE when lower-priced alternatives are available. Therefore, the proposed Transitional Sales Service Agreements do no more than maintain the status quo. [35]

4. Rate Freeze; Stranded Cost Recovery

The February 25 Order found that NEPCO's 10-year rate freeze proposal provided wholesale customers with adequate protection from potential harmful effects of the Divestiture Transaction. It also found that it was premature to address Norwood's concerns about stranded costs because Norwood had not yet terminated its requirements service contract with NEPCO. [36]

On rehearing, Norwood argues that it was improper to freeze its rates for 10 years and that NEPCO was seeking excessive recovery of stranded costs.

We will dismiss rehearing on this issue as moot. In its application in Docket No. ER98-2233-000, NEPCO informed the Commission that Norwood had requested early termination

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[35] 82 FERC at 61,665.

[36] Id. at 61,659-60.

of its wholesale requirements service from NEPCO and that NEPCO was filing an amendment to its applicable tariff to allow Norwood to terminate wholesale requirements service as of April 1, 1998. By order issued on May 15, 1998, the Commission accepted for filing NEPCO's tariff amendment, which provides for early termination by Norwood (and other customers served under that tariff) upon payment of a contract termination charge. [37] Consequently, the rate freeze issue is moot, and Norwood's concerns regarding NEPCO's recovery of stranded costs from it were addressed in Docket No. ER98-2233-000.

The Commission orders:

(A) The requests for clarification are hereby granted in part and denied in part, and the requests for rehearing are hereby denied in part and dismissed as moot in part, as discussed in the body of this order.

(B) The NEES Companies' motion to answer Norwood's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

David P. Boergers,
Acting Secretary.

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[37] New England Power Company, 83 FERC ¶ 61,174 (1998).

UNITED STATES OF AMERICA 83 FERC ¶ 61,174
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

New England Power Company) Docket No. ER98-2233-000

ORDER ACCEPTING AMENDMENT FOR FILING

(Issued May 15, 1998)

On March 18, 1998, New England Power Company (NEPCO) filed an amendment to its FERC Electric Tariff, Original Volume No. 1 (Tariff No. 1), to permit its Tariff No. 1 customers the option of terminating service early, subject to the payment of a contract termination charge (CTC). As discussed below, NEPCO's amendment is accepted for filing, without suspension or hearing, to become effective on March 31, 1998.

Background

NEPCO provides wholesale requirements service under Tariff No. 1 subject to a term provision that is set forth at Schedule I, Section N. The term provision currently provides, in its entirety, that "[o]nce initiated, service under this tariff shall continue until terminated by either party giving to the other at least seven years' written notice of termination directed to the end of the calendar month."

In its filing, NEPCO proposes to modify Section N to permit a customer, at its election, to terminate service early, subject to the payment of a CTC. The CTC would be based on a formula set forth in proposed Section II-C of Tariff No. 1 and is based on the revenues lost approach approved by the Commission in Order No. 888 [1] for calculating stranded costs. NEPCO states, however, that the proposed amendment is not designed to recover extra-contractual costs and therefore is not a mechanism for recovering stranded costs, as defined in Order No. 888.

NEPCO states that the CTC formula is designed to compensate NEPCO for the revenues it would otherwise be entitled to collect in the absence of the customer's early termination of its Tariff No. 1 service agreement, as adjusted for the revenues attributable to NEPCO's transmission costs. The CTC would be collected by NEPCO until such time as the customer could have unilaterally terminated service under Schedule I, Section N and any applicable provisions of the customer's service agreement with NEPCO. [2]

NEPCO states that its proposed amendment implements a commitment it made as part of its application in Docket Nos. EC98-1-000 and ER98-6-000, wherein NEPCO, among other things, proposed to divest certain jurisdictional facilities as part of the sale of substantially all of its non-nuclear generating

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[1] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[2] Application at Exhibit A, Schedule II-C, Section B(3)(b).

assets to USGen New England, Inc. (USGenNE) and agreed to offer its Tariff No. 1 customers an "open season" in which they could terminate their wholesale requirements service early, subject to the payment of a CTC. [3] The Commission, among other things, approved the proposed divestiture of jurisdictional facilities on February 25, 1998. [4]

NEPCO states that the proposed amendment would be available to those customers who have not entered into a negotiated agreement with NEPCO to terminate their Tariff No. 1 service early. [5] NEPCO emphasizes, however, that it stands ready to negotiate termination agreements with its wholesale requirements customers on mutually agreeable terms.

NEPCO states that its proposed amendment would permit one of its wholesale requirements customers, the Town of Norwood, Massachusetts (Norwood), to terminate its

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[3]The proposed divestiture was the product of settlements entered into among NEPCO's parent company, the New England Electric System (NEES), its subsidiaries, the Massachusetts Attorney General, Rhode Island and Massachusetts regulatory agencies, and other parties, which was entered into to implement retail choice programs in Massachusetts and Rhode Island.

[4]New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc., 82 FERC ¶ 61,179 (1998), reh'g pending.

[5]The Commission has previously approved negotiated agreements for the early termination of Tariff No. 1 service between NEPCO and its affiliates, Massachusetts Electric Company and Narragansett Electric Company in New England Power Company, 81 FERC ¶ 61,281 (1997); between NEPCO and the Town of Littleton, New Hampshire in New England Power Company, 81 FERC ¶ 61,334 (1997); and between NEPCO and its affiliate Granite State Electric Company in New England Power Company, 83 FERC ¶ 61,085 (1998).

existing Tariff No. 1 service effective April 1, 1998, consistent with Norwood's written notice to NEPCO, dated March 4, 1998. [6] NEPCO states that absent the proposed amendment, Norwood would not be permitted to terminate its Tariff No. 1 service prior to November 1, 2008 because of certain conditions set forth in Norwood's service agreement. [7]

NEPCO requests that its amendment be made effective March 31, 1998 and seeks waiver of the Commission's notice requirement pursuant to 18 C.F.R. § 35.11 (1997).

Notice of Filings and Interventions

Notice of NEPCO's filing was published in the Federal Register, [8] with comments, protests, and motions to intervene due on or before April 7, 1998. A motion to intervene and

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[6]NEPCO's Application at Exhibit C. NEPCO states that it received Norwood's written notice on March 5, 1998. Although the proposed amendment would require 30 days advance written notice of termination, NEPCO states that it is willing to waive this requirement with respect to Norwood.

[7]Application at Exhibit D. Norwood's service agreement was executed on April 11, 1983. It was subsequently amended on January 11, 1989 to provide, inter alia, that "[n]either NEP[CO] nor Norwood will give notice of termination prior to November 1, 1991 and shall not specify a termination date prior to November 1, 1998, provided, however, that Norwood may elect to extend the earliest date by which either party can give notice of intent to terminate by a total of 20 years in two ten-year increments." Id. Subsequently, by written notice provided July 25, 1990, Norwood "extend[ed] the date by which either NEP[CO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the Power Contract between NEP[CO] and Norwood dated April 11, 1983, to November 1, 2001." Id.

[8]63 Fed. Reg. 16,488 (1998).

motion to reject was timely filed by Norwood.

Norwood asserts in its motion that NEPCO's proposed CTC fails to satisfy two of the Commission's requirements for stranded cost recovery as set forth in Order No. 888. Specifically, Norwood argues that it is not now and does not intend to become an unbundled wholesale transmission service customer of NEPCO and that NEPCO does not have a "reasonable expectation" of continuing to provide wholesale requirements service to Norwood following the expiration of Norwood's service agreement.

Norwood also argues that the Commission should dismiss NEPCO's filing pending resolution of an earlier-filed action now pending in the United States District Court for the District of Massachusetts. [9] Norwood states that the complaint filed in that proceeding alleges that NEPCO's voluntary divestiture of non-nuclear generation facilities resulted in a breach and violation of a Decree and Order issued by the District Court on April 12, 1983, [10] a breach of contract under Norwood's service agreement with NEPCO, and a violation of federal antitrust statutes. Norwood contends that in the event its requested relief is granted by the District Court, NEPCO would not be entitled to recover stranded costs from Norwood because the service agreement between the parties would be deemed to be terminated and Norwood would not thereafter become a transmission customer of NEPCO. However, "Norwood does not request a hearing in this proceeding."

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[9]Town of Norwood v. New England Power Co., et al., No. 907-10818-PBS (D. Mass. filed April 14, 1997).

[10]Town of Norwood v. New England Power Company, No. 74-4104-T (D. Mass. April 12, 1983).

NEPCO filed an answer to Norwood's pleading. In its answer, NEPCO argues, inter alia, that its proposed CTC is consistent with Order No. 888, that Norwood has not demonstrated that NEPCO has breached its contract obligations to Norwood, and that Norwood's additional arguments in opposition to the amendment are baseless. Norwood subsequently filed an answer to NEPCO's answer.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the timely, unopposed motion to intervene of Norwood serves to make it a party to this proceeding. Pursuant to Commission Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2)(1997), we hereby reject the answers filed by NEPCO and Norwood.

Analysis

As explained below, we will accept NEPCO's proposed amendment to Tariff No. 1 without hearing or suspension. We will grant waiver of our notice requirement and allow the amendment to become effective March 31, 1998.

The proposed amendment provides NEPCO's Tariff No. 1 customers with the option of buying out their service agreements by the payment of a CTC. The right to buy out and thus terminate service would be supplemental to, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their

contracts.[11] In Order No. 888-A, for example, we stated that a customer may seek to shorten the term of the contract and that "any contract modification approved by the Commission will take into account the issue of appropriate stranded cost recovery by the customer's supplying utility." [12]

The proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity and energy. [13] Payment of the full demand charges over the remainder of the contract term would thus be avoided. Under the circumstances presented, we find the proposed amendment to be reasonable and therefore will accept it.

We further find that Norwood's arguments in opposition to the amendment are without merit. First, Norwood's reliance on the stranded cost recovery requirements set forth at 18 C.F.R. § 35.26 (1997) are misplaced, because NEPCO's CTC would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations.

Second, Norwood's request that the Commission dismiss NEPCO's filing in deference to Norwood's pending

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[11] See, e.g., Order No. 888 at 31,664-65; Order No. 888-A at 30,193.

[12] Order No. 888-A, at 30,193; see also Order No. 888 at 31,664.

[13] The proposed formula for CTC calculation differs from that applicable to other wholesale power customers (see supra note 5), including affiliates, that have entered into negotiated agreements with NEPCO for the early termination of Tariff No. 1 service. NEPCO explains that it remains willing to negotiate similar termination agreements, with Norwood and other wholesale requirements customers, and that the proposed amendment provides an early termination option to non-settling customers such as Norwood.

court litigation is without merit. Under section 205(d) of the Federal Power Act (FPA), 16 U.S.C. § 824d (1994), a public utility such as NEPCO generally has a right to file proposed changes in the rates, terms or conditions of service or any contract relating thereto, and typically the Commission must act within 60 days of a filing. The fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generation facilities constituted a breach of contract on NEPCO's part does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability. NEPCO is offering customers an option they would not otherwise have unless the customers were to file a section 206 proceeding to amend the contract and bear the burden of presenting evidence that the contract is no longer just and reasonable (and, in Norwood's case, that Norwood should be able to break the contract without paying costs owed under the contract). Norwood, of course, can always file a section 206 complaint, as discussed above, during the pendency of the court action.

The Commission orders:

(A) NEPCO's amendment to Tariff No. 1 is hereby accepted for filing, without suspension or hearing, to become effective on March 31, 1998, as discussed in the body of this order.

(B) NEPCO is hereby informed of the rate schedule designations shown on the Attachment.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Acting Secretary.

Attachment

New England Power Company
Docket No. ER98-2233-000
Rate Schedule Designations
Effective Date: March 31, 1998

Designation	Description
Fourth Revised Page No. 9 under FERC Electric Tariff, Original Volume No. 1 (Supersedes Third Revised Page No. 9)	Revised Term of Service
Original Sheet Nos. 1-5 of Schedule II-C under FERC Electric Tariff, Original Volume No. 1	Formula for the Calculation of Contract Termination Charges

New England Power Company

Docket No. ER98-2233-001

FEDERAL ENERGY REGULATORY COMMISSION - COMMISSION

84 F.E.R.C. P61,175; 1998 FERC LEXIS 1574

ORDER DENYING REHEARING

August 5, 1998

CORE TERMS: tariff, terminate, affiliate, customer, divestiture, service agreement, wholesale, breach of contract, public utility, non-nuclear, termination, electric, proposed amendment, effective, energy, reply, clarification, generating, notice of termination, interstate commerce, leave to file, discriminatory, abbreviated, generation, negotiated, litigating, expired, formula, unduly, notice

PANEL: Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

OPINION:

The Town of Norwood, Massachusetts (Norwood) requests rehearing of the Commission order issued in this proceeding on *May 15, 1998, New England Power Company, 83 FERC P61,174 (1998)* (May 15 order). In the May 15 order, the Commission accepted a tariff amendment filed by New England Power Company (NEPCO) to permit its wholesale requirements customers the option of terminating service early,

subject to the payment of a contract termination charge (CTC). As explained below, we will deny rehearing.

Background

The background of this case and related proceedings is discussed in detail in the May 15 order. Briefly, NEPCO provides wholesale requirements service under its FERC Electric Tariff, Original Volume No. 1 (Tariff No. 1), subject to a seven years' notice of termination provision set forth at Schedule I, Section N. In its proposed amendment, NEPCO proposed to modify Section N to permit a customer, at its election, to terminate service with less than seven years' notice, subject to the payment of a CTC. [1] NEPCO filed the proposed amendment to permit Norwood to terminate its existing Tariff No. 1 service effective April 1, 1998, consistent with Norwood's written notice to NEPCO, dated March 4, 1998. The option to terminate early upon payment of a CTC would also be available to NEPCO's other Tariff No. 1 customers.

In the May 15 order, we found that the option to buy out and thus terminate service by payment of the proposed CTC would be supplemental to, and generally consistent with, the existing opportunity available to NEPCO's Tariff No. 1

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[1] NEPCO stated in its transmittal letter that the amendment implemented a commitment it made as part of its application in Docket Nos. EC98-1-000 and ER98-6-000, wherein NEPCO, among other things, proposed to divest certain jurisdictional facilities as part of the sale of substantially all of its non-nuclear generating assets to USGen New England, Inc. This commitment was to offer its Tariff No. 1 customers an "open season" in which they could terminate their wholesale requirements service early, subject to the payment of a CTC. NEPCO's divestiture was approved by the Commission in *New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc., 82 FERC P61,179,* order on clarification and reh'g, *83 FERC P61,275 (1998).*

customers who seek to modify and/or terminate their contracts.[2] We also found that the proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice of termination term, less an estimate of the market value of the released capacity and energy, and that payment of the full demand charges over the remainder of the contract term would thus be avoided. [3] Accordingly, we accepted the proposed amendment for filing without suspension or hearing, to be effective March 31, 1998.

On rehearing, Norwood argues, in essence, that it need not pay the CTC because its service agreement expired prior to NEPCO's filing. Norwood also claims that the CTC is unduly discriminatory in favor of NEPCO's distribution company affiliates who are also Tariff No. 1 customers; [4] that the amendment should not have been accepted for filing under the Commission's abbreviated filing requirements; that NEPCO, following its divestiture, is not a "public utility" under the Federal Power Act (FPA); that the CTC violates the filed rate doctrine and constitutes an unlawful award of contract damages; and that the CTC is not authorized under section 212 of the FPA, *16 U.S.C. § 824k* (1994). [5]

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[2] *83 FERC at 61,723.*

[3] Id.

[4] The Commission has previously approved negotiated agreements for the early termination of Tariff No. 1 service between NEPCO and its affiliates, Massachusetts Electric Company and Narragansett Electric Company, in *New England Power Company, 81 FERC P61,281 (1997)*, order denying reh'g, *83 FERC P61,265 (1998)*, and NEPCO's affiliate, Granite State Electric Company, in *New England Power Company, 83 FERC P61,085 (1998)*, reh'g pending.

[5] NEPCO filed a motion for leave to file an answer and answer to Norwood's rehearing request, and Norwood filed a reply to

(continued...)

Discussion

We reject Norwood's position that the payment of the CTC is non-mandatory, as to Norwood. Norwood contends that its Tariff No. 1 service agreement expired prior to the date that the CTC amendment became effective and that Norwood is therefore not subject to the CTC. In support of this view, Norwood raises a number of issues which it is currently litigating in a state court proceeding. [6] These issues, however, stray well beyond the scope of this proceeding. As we stated in the May 15 order, "the fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generation facilities constituted a breach of contract on NEPCO's part [that, according to Norwood, authorized it to terminate its service agreement] does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability." [7]

With respect to Norwood's argument that the CTC, as applied to Norwood, would be unduly discriminatory as compared to the CTC paid by NEPCO's affiliates, it is true that the CTC formulas applicable to NEPCO's affiliates differ from

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[5](...continued)
NEPCO's answer. Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(1998), NEPCO's motion is hereby denied and Norwood's reply is rejected.

[6] In brief, Norwood claims that NEPCO's voluntary divestiture of its non-nuclear generation facilities resulted in a violation of a Decree and Order issued by United States District Court for the District of Massachusetts on April 12, 1993, a breach of contract under Norwood's service agreement with NEPCO, and a violation of federal antitrust statutes. Town of Norwood v. New England Power Co., et al., No. 907-10818-PBS (D. Mass. filed April 14, 1997).

[7] *83 FERC at 61,724.*

the CTC calculation approved in this proceeding. [8] The CTCs applicable to NEPCO's affiliates, however, were the subject of negotiated settlements regarding the payment of the CTCs and other issues. Under these circumstances, the differences between the CTCs do not give rise to a claim of undue discrimination. [9]

Norwood also raises other arguments which we reject. Contrary to Norwood's claims, NEPCO properly used our abbreviated filing requirements in this case, because payment of the CTC will not result in a rate increase over the existing Tariff No. 1 rates. Because these existing "filed rates" remain in effect, moreover, there is no violation of the filed rate doctrine, as Norwood argues. We also reject Norwood's assertion that NEPCO is barred from collecting a CTC under section 212 of the FPA, *16 U.S.C. § 824k* (1994). The rate conditions set forth in section 212, on which Norwood relies, have no applicability to NEPCO's CTC. Nor does the CTC constitute an unlawful award of contract damages (as Norwood would have it) since the payment of the CTC is not premised on a breach of contract, but rather on the fulfillment of the parties' contract obligations. We also dismiss Norwood's claim that NEPCO is not a "public utility." Notwithstanding NEPCO's divestiture of some of its generating facilities, NEPCO remains a public utility that continues to be engaged in the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. In addition, we reject Norwood's assertion that an

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[8] See *83 FERC P61,265 at 62,104; 83 FERC P61,085 at 61,419, n.5.*

[9] *Cities of Bethany, et al. v. FERC, 727 F.2d 1131, 1139* (D.C. Cir.), cert. denied, *469 U.S. 917 (1984);* see also *Pacific Gas and Electric Co., et al., 51 FERC P61,371 at 62,264,* order denying reh'g, *52 FERC P61,318 (1990).*

evidentiary hearing in this case was necessary, given our finding in the May 15 order that no party raised any issue of material fact requiring an evidentiary proceeding.

Finally, we will summarily reject Norwood's arguments that the CTC violates the Commission's stranded cost requirements under Order No. 888 and that NEPCO's filing should have been dismissed, or in the alternative held in abeyance, pending the outcome of Norwood's pending litigation in the District Court of Massachusetts. We already fully considered and rejected these arguments in the May 15 order.[10]

The Commission orders:

(A) Norwood's request for clarification and, in the alternative, for rehearing, is hereby denied, as discussed in the body of this order.

(B) NEPCO's motion for leave to file an answer to Norwood's request for rehearing is hereby denied and Norwood's reply is hereby rejected, as discussed in the body of this order.

By the Commission.

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[10] 83 FERC at 61,723-24.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1847, No. 98-1876, No. 98-2072
TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 98-2198, No. 98-2199
NORTHEAST CENTER FOR SOCIAL ISSUES STUDIES,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Before: Boudin, Stahl, Lipez, Circuit Judges.

ORDER OF COURT
Entered: March 1, 2000

Upon consideration of The Town of Norwood's petition for rehearing,

It is ordered that said petition be denied.

By the Court:
PHOEBE MORSE, Clerk

cc: Messrs. Wheatley, Posner, Roos-Collins, Gasteiger, Berlin, Ferkin

Section 205(a) and (b) of the Federal Power Act, 16 U.S.C. §824d (1997)

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject to any undue prejudice or disadvantage; or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 212(a) and (e) of the Federal Power Act, as amended by the Energy Policy Act of 1992 16 U.S.C. 824k(a) and 824k(e)(2) (1997)

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms and conditions for wholesale transmission service

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

* * *

(e) Savings provisions

* * *

(2) Sections 824i, 824j, 824*l*, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section relates to unfair methods of competition

Section 313(b) of the Federal Power Act
16 U.S. C, §825*l* (1997)

§ 825*l*. Review of Orders

* * *

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section

2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such a manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon *certiorari* or certification as provided in Section 1254 of Title 28.

FERC Regulations, 18 C.F.R. § 35.13

§ 35.13 Filing of changes in rate schedules

I. ***General rule.***

Every public utility shall file the information required by this section, as applicable, at the time it files with the Commission under § 35.1 of this part all or part of a rate schedule to supersede, supplement, or otherwise change the provisions of a rte schedule filed with the Commission under § 35.1. Any petition filed under §385.207 of this chapter for waiver of any provision of this section shall specifically identify the requirement that the applicant wishes the Commission to waive.

(1) ***Filing for any rate schedule change not otherwise excepted***

Except as provided in paragraph (a)(2) of this section, any utility that files a rate schedule change shall submit with its filing the information specified in paragraphs (b), (c), (c), (e) and (h) of this section, in accordance with paragraph (g) of this section.

(2) ***Abbreviated filing requirements***

(i) ***For certain small rate increases***

Any utility that files a rate increase for power or transmission service not covered by paragraph (a((2)(ii) of this section may elect to file under this paragraph instead of paragraph (a)(1) of this section, if the proposed increase for the Test Period, as defined in paragraph (a)(2)(i)(A) of this section, is equal to or less than $200,000, regardless of customer consent, or equal to or less than $1 million if all wholesale

customers that belong to the affected rate class consent.

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

* * *

FERC Regulations, 18 C.F.R. § 35.26

§ 35.26 Recovery of stranded costs by public utilities and transmitting utilities

I. *Purpose.*

This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover

stranded costs.

II. *Definitions.* –

Wholesale stranded costs means any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service to:

(i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission service company of such public utility or transmitting utility.

ADMINISTRATIVE PROCEDURE ACT

§706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...

* * *

Supreme Court, U.S.
FILED
AUG 7 2000
CLERK

(2)

No. 99-1914

In the Supreme Court of the United States

TOWN OF NORWOOD, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND NEW ENGLAND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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20pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Energy Regulatory Commission acted reasonably and in accordance with its authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, in approving a series of filings made by the New England Power Company (NEPCO) that (1) allow NEPCO's wholesale electric power customers the option of terminating their power–purchase contracts early in return for paying a contract–termination charge to reimburse NEPCO for costs it incurred in expectation of serving those customers for the full contract term; (2) permit NEPCO to divest itself of certain generation assets; and (3) restructure NEPCO's contractual relationship with certain of its affiliates to accommodate state-imposed retail competition requirements.

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In the Supreme Court of the United States

No. 99-1914

TOWN OF NORWOOD, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND NEW ENGLAND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 202 F.3d 392. The orders of the Federal Energy Regulatory Commission (Pet. App. 28a-116a) are reported at 81 F.E.R.C. ¶ 61,281 (1997), 82 F.E.R.C. ¶ 61,179 (1998), 83 F.E.R.C. ¶ 61,174 (1998), 83 F.E.R.C. ¶ 61,265 (1998), 83 F.E.R.C. ¶ 61,275 (1998), and 84 F.E.R.C. ¶ 61,175 (1998).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2000. A petition for rehearing was denied on March 1, 2000 (Pet. App. 117a). The petition for a writ of certiorari was filed on May 30, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 205(c) of the Federal Power Act (FPA), 16 U.S.C. 824d(c), public utilities are required to file all rates pertaining to sales within the jurisdiction of the Federal Energy Regulatory Commission (FERC), and all contracts affecting such rates, with the Commission. Any changes to previously-filed tariffs must be submitted in accordance with FPA Section 205(d), 16 U.S.C. 824d(d), and the Commission in turn is empowered to investigate the reasonableness of the proposed change pursuant to FPA Section 205(e), 16 U.S.C. 824d(e). Under Section 203(a) of the FPA, 16 U.S.C. 824b(a), the Commission must approve the disposition of facilities subject to its jurisdiction if they have a value in excess of $50,000, and the Commission must also approve mergers.

The Commission's authority to entertain proposed modifications to a filed tariff is subject to judicially-developed doctrines respecting the parties' contractual interests. In this regard, the *Mobile-Sierra* doctrine holds that where parties have negotiated a contract that denies either party the right to change prices unilaterally, FERC may abrogate or modify the contract only if the public interest so requires. See *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348 (1956). As a separate matter, under the filed rate doctrine, a utility may lawfully charge only the rate that is reflected in the tariff on file when the service is performed. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981). A corollary principle, pertinent here,

prohibits retroactive rate increases for tariffed services. *Ibid.*

Since enactment of the FPA in 1935, the electric utility industry has undergone significant changes. Alternative electric power suppliers have created a wholesale market for low-cost power to compete with the traditional, vertically integrated utilities that had built high-cost generation capacity. FERC has taken various steps to encourage this competition. Invoking its authority under Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e, to remedy unduly discriminatory or preferential rules, regulations, practices or contracts affecting public utility rates for transmission in interstate commerce, FERC issued Order No. 888 and accompanying regulations requiring all public utilities owning or controlling transmission facilities to offer non-discriminatory open access transmission services.[1] See generally *Transmission Access Policy Study Group* v. *FERC*, No. 97-1715, 2000 WL 762706, at *5-*6 (D.C. Cir. June 30, 2000). At the same time, recognizing that utilities required to provide non-discriminatory access to their transmission lines might incur transition (*i.e.*, "stranded") costs because their historic customers could, under the new regulations, import cheaper power purchased elsewhere, the Commission provided utilities

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[1] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), clarified, 76 F.E.R.C. ¶¶ 61,009 and 61,347 (1996), modified, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd in part and remanded in part *sub nom. Transmission Access Policy Study Group* v. *FERC*, No. 97-1715, 2000 WL 762706 (D.C. Cir. June 30, 2000).

a limited opportunity to recover stranded costs that they incur as a result of its new rules. *Ibid.* The stranded cost regulations are codified at 18 C.F.R. 35.26.

2. New England Power Company (NEPCO) is a public utility subject to FERC's jurisdiction under the FPA. NEPCO and its affiliates are also subject to regulation by the States of Massachusetts and Rhode Island to the extent they provide retail services to customers within those States.

Between December 1996 and May 1998, NEPCO made a series of filings with FERC for the ultimate purpose of accommodating the introduction of retail electric power competition in Massachusetts and Rhode Island.[2] Taken together, the filings sought FERC approval of changes to certain wholesale power sales agreements between NEPCO and its affiliates; the sale of non-nuclear generation assets by NEPCO to USGen New England, Inc. (USGen); and a general revision to NEPCO's tariff that would allow NEPCO's wholesale power customers to terminate their power contracts early in return for paying a "contract termination charge." See Pet. App. 4a-7a.

In the first filing, NEPCO proposed amending its power sales agreements with its affiliates in Massachusetts and Rhode Island that purchase power at wholesale from NEPCO under FERC-approved tariffs and resell that power to retail customers in those States. It

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[2] Several States, including Massachusetts and Rhode Island, have acted within their authority to regulate intrastate retail services to encourage electric utility competition. They have, *inter alia*, adopted retail access programs to require electric utilities within their borders to provide retail customers a choice of electricity suppliers.

proposed to permit such affiliates to terminate their long-term requirements contracts on short notice in order to allow them to purchase cheaper power from other electric suppliers. The early termination, however, would be subject to the payment of a contract termination charge (CTC) to reimburse NEPCO for a portion of the costs it had incurred in preparing to meet its obligation to provide power to the affiliates over the full term of their long-term contracts.[3] Ultimately, NEPCO's December 1996 filing was resolved through settlement agreements with its affiliates and state regulatory authorities. The settlements, presented to FERC for approval, permitted early contract termination for NEPCO's affiliates subject to payment of a CTC. It also obligated NEPCO to provide its affiliates with the option of taking service from NEPCO under new "wholesale standard offer rates" for a limited transition period at escalating prices set by the Massachusetts and Rhode Island regulatory authorities under their retail restructuring programs.[4] In addition, the settlements obligated NEPCO to file with the Commission a plan to divest itself of most of its generation assets. Pet. App. 4a-5a.

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[3] Under NEPCO's contracts with its affiliates, neither party could terminate the long-term power contract without providing seven-years' advance notice of termination. See Pet. App. 5a.

[4] The standard offer rates were intended to provide a safeguard for retail customers of the affiliates that did not or could not immediately take advantage of the competitive sources of retail supply that were expected to develop. The rates increased sharply over a brief period of time to induce customers to migrate to the competitive market once they have had time to negotiate with retailers that, as a result of federal and state efforts to provide access to new sources of power, would now be able to compete to supply once-captive customers. Pet. App. 17a-18a.

In accordance with the terms of its settlement agreements, on October 1, 1997, NEPCO sought Commission approval under FPA Section 203, 16 U.S.C. 824b, to sell generating assets to USGen. In connection with its proposed purchase of those assets, USGen agreed to assume responsibility for providing NEPCO's affiliates with the wholesale standard offer service, and NEPCO proposed to implement a rate freeze that would prevent increases in its rates for its remaining wholesale customers. Pet. App. 5a.

Petitioner, one of the remaining wholesale customers, objected to NEPCO's proposed settlements with its affiliates and to the proposed divestiture transaction. Petitioner purchased electricity at wholesale from NEPCO and resold that electricity to retail customers in Massachusetts. Contending that the wholesale standard offer rates proposed for NEPCO's affiliates would provide them with an unfair advantage as retail competitors, petitioner objected to the filings. In addition, on March 4, 1998, petitioner notified NEPCO that it was canceling its power supply contract with NEPCO, which had been extended to the year 2008, and switching to a different wholesale supplier effective April 1, 1998.[5]

NEPCO responded to petitioner's cancellation notice by filing a proposed revision to its FERC tariff that would provide all of its wholesale customers, including petitioner, the opportunity to terminate their long-term requirements contracts on 30-days' notice, rather than the seven-years' notice of termination required under

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[5] Petitioner had purchased power from NEPCO since 1983, under FERC-approved agreements, for resale to petitioner's retail customers. See *Town of Norwood* v. *FERC*, No. 99-2155, 2000 WL 822872, at *1 (1st Cir. June 29, 2000).

the FERC tariff, on the payment of a CTC. Petitioner objected to this filing as well, arguing that the CTC for the non-affiliated wholesale purchasers, standing alone and in concert with the settlement and the divestiture filings, was unlawful and unduly discriminatory. Pet. App. 6a-7a.

In three sets of orders issued between November 1997 and June 1998, the Commission approved all three NEPCO filings. *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g denied, 83 F.E.R.C. ¶ 61,265 (1998), Pet. App. 28a-43a (approving the settlement agreements between NEPCO and its affiliates); *New England Power Co.*, 82 F.E.R.C. ¶ 61,179, reh'g denied, 83 F.E.R.C. ¶ 61,275 (1998), Pet. App. 44a-101a (approving the sale of NEPCO's non-nuclear generating facilities to USGen); *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, reh'g denied, 84 F.E.R.C. ¶ 61,175 (1998), Pet. App. 102a-116a (approving the amendment of NEPCO's tariff to permit its unaffiliated customers to terminate their long-term contracts prematurely subject to payment of a CTC). The Commission considered and rejected petitioner's various challenges to the filings, including, *inter alia*, that NEPCO's proposals conflicted with Order No. 888's stranded-cost recovery regulations, constituted an impermissible award of contract damages, violated the *Mobile-Sierra* and filed rate doctrines, and resulted in discriminatory and anticompetitive charges. In doing so, the Commission acknowledged that there existed a contract dispute between petitioner and NEPCO triggered by petitioner's cancellation, but specifically declined to address either the merits of that dispute or the impact of that dispute

on the general tariff provision changes before it. Pet. App. 108a-109a, 114a.[6]

3. The court of appeals upheld the Commission's orders in all respects. Pet. App. 1a-27a. The court began by addressing what it perceived to be the principal focus of petitioner's attack: the Commission's approval of NEPCO's tariff amendment permitting wholesale customers like petitioner to terminate their long-term contracts early, subject to the payment of a CTC. First, the court rejected petitioner's contention that in approving the CTC the Commission violated its Order No. 888 stranded-cost regulations. The Commission had found that those regulations did not apply to NEPCO's filings. The court affirmed the Commission's interpretation of the regulations and went on to observe, as did the Commission, that there was a separate (although parallel) justification for stranded–cost recovery specifically recognized by Order No. 888:

> [Petitioner] as a requirements-contract customer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. *New England Power Co.*, 83 FERC ¶ 61,174 at 61,722-23 (1998). In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. *See* Order No. 888, 61 Fed. Reg. at 21662 (reserving the possibility of stranded cost recovery in other situations).

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[6] For a description of the history and disposition of that contract dispute, see *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), petition for cert. pending, No. 99-1913.

Pet. App. 10a.

Next, the court of appeals addressed petitioner's claim that the CTC was nothing more than an effort to collect contract damages and therefore was inconsistent with FERC's practice of deferring to the courts on matters involving contract disputes. In rejecting that claim, the court of appeals found that while the Commission precedent relied on by petitioner reflected an unwillingness on the part of the Commission to resolve disputes over the meaning of contract provisions, no such dispute was involved here, where the Commission was merely approving, on a generic basis, a CTC for customers who wished to terminate their contracts early. Pet. App. 11a.

The court of appeals also found no merit to petitioner's claims that the Commission was required to reject NEPCO's proposed CTC on the basis of the *Mobile-Sierra* and filed rate doctrines. As to the *Mobile-Sierra* doctrine, the court took the view that, by permitting its non-affiliated customers to terminate their contracts early subject to the payment of a CTC, NEPCO could be viewed as having modified the contract. But the court went on to note that

> from [petitioner's] vantage, the option merely gives it something that it did not have before; it remained free to insist that New England Power continue to supply power under the contract until expiration. The termination charge is certainly a detriment, but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if [petitioner] had no option but simply breached the existing contract.

Pet. App. 12a.

Generally, the filed rate doctrine works to prohibit retroactive increases for tariffed services. See *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981). Applying that formulation of the doctrine, the court of appeals found no error in the Commission's approval of the CTC tariff amendment. The court reasoned that, as the tariff amendment did not require petitioner to pay more for past purchases, there was no retroactive increase for tariffed services. Instead, the tariff amendment merely gave petitioner an option it did not have before to cancel future purchases on short notice, subject to the payment of termination charges. Pet. App. 12a-13a.

The court of appeals also rejected petitioner's contentions that NEPCO's proposed CTC was unduly discriminatory because it differed from the CTC that NEPCO had negotiated by settlement with its affiliates and that a full evidentiary hearing was warranted on this issue. Pet. App. 15a. In rejecting that argument, the court observed that differential treatment does not necessarily amount to undue preference where the difference in treatment can be explained in an acceptable manner. *Ibid.* Here, the court affirmed the Commission's determination that differential treatment was acceptable because petitioner had passed up the opportunity to settle on the same terms as NEPCO's affiliates. *Id.* at 16a-17a. Moreover, as petitioner's request for a hearing had been ruled by the Commission to be untimely and unsupported, and petitioner had not rebutted those rulings, the court of appeals found no merit to petitioner's claim that it was entitled to a hearing. *Id.* at 16a.

This left petitioner's claims that the wholesale standard offer rates, which were offered to NEPCO's affiliates under the terms of the settlement but not to peti-

tioner, were unduly discriminatory, and when coupled with the CTC, were anticompetitive. The court of appeals held that it was not discriminatory for NEPCO to limit its standard offer rates to its affiliates, because only its affiliates, and not petitioner, were required by state regulators to provide corresponding retail standard offer rates to their own customers. Pet. App. 17a-18a. The court held that the fact that petitioner, as a municipal system, was under no obligation to provide such service distinguished petitioner from NEPCO's affiliates and sufficiently justified differential treatment. *Id.* at 18a. As to petitioner's claims of anticompetitive effects, the court found that petitioner had forfeited any argument on that issue because it had done little more than make conclusory allegations and had "virtually abdicated its responsibility to brief the issue to us." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner contends that the court of appeals and FERC misapplied agency regulations and agency and judicial precedent to the facts of this case. The misapplication of settled law to particular facts, however, does not warrant this Court's review. In any event, the court of appeals properly evaluated and rejected petitioner's several claims.

a. Petitioner's contention that the court of appeals misread the Commission's Order No. 888 regulations regarding the recovery of stranded costs, and thereby created a major uncertainty requiring the Court's review (Pet. 13-16), has no basis. As the Commission

made plain in issuing Order No. 888, the stranded-cost regulations promulgated by that order were not to serve as the exclusive means for a utility to recover stranded costs.[7] As the court of appeals correctly observed, "the restrictions in Order No. 888 are no more than conditions on stranded cost recovery under *that* order and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation." Pet. App. 10a-11a (emphasis added). Cf. *Transmission Access Policy Study Group* v. *FERC*, 2000 WL 762706, at *23-*25 (recognizing that FERC's Order No. 888 stranded-cost recovery regulations were created to deal with stranded costs incurred by FERC's regulation requiring open-access transmission service). Thus there is no basis for petitioner's claim that NEPCO's proposed CTC should have been rejected because it did not meet the requirements of those regulations,[8] and there is no "uncertainty," as pe-

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[7] See Order No. 888, 61 Fed. Reg. 21,662 (1996) (noting that, in the case of "voluntary restructuring," FERC "[is] willing to consider case-specific proposals for dealing with stranded costs"); see also Order No. 888-A, 62 Fed. Reg. 12,382 (1997) ("Order No. 888 does not by its terms bar the recovery of costs that do not result from the use of Commission-required transmission access (i.e., costs that result when a departing customer does not use the former supplying utility's open-access tariff). Utilities may, as before, seek recovery of such non-open-access-related costs on a case-by-case basis in individual rate proceedings."); *id.* at 12,406 ("Such costs are outside the scope of the rule [No. 888] because such costs would not be stranded as a direct result of the new open access.").

[8] Petitioner wrongly suggests (Pet. 15-16) that NEPCO could not permissibly amend its tariff to provide customers the option of terminating their long-term contracts early by paying a CTC absent compliance with Order No. 888's stranded-cost regulations.

titioner claims (Pet. 16), in the recovery of stranded costs. In any event, should such uncertainty arise, it can be addressed in the first instance through administrative proceedings and, if necessary, appellate review, and does not now warrant this Court's attention.

b. Nor was there any misapplication of breach-of-contract law, as petitioner claims (Pet. 17-18). As the court of appeals properly characterized the matter, there is no breach of contract at issue in this case. Pet. Ap. 11a. The Commission neither interpreted petitioner's contract with NEPCO nor determined whether petitioner breached its contract with NEPCO. Rather, at issue was a general tariff amendment providing an option for customers bound by existing contracts to terminate their long-term obligations by paying a CTC. The Commission's decision does not address the situation of customers breaching their contracts. Thus, this case presents no significant question of contract law, much less "an irreconcilable conflict" with the jurisdiction of courts adjudicating breach-of-contract claims, as petitioner argues.

2. Petitioner argues (Pet. 18-24) that the court of appeals erroneously applied this Court's decisions to the facts of the case. In particular, petitioner claims that the court of appeals misapplied the *Mobile-Sierra* and filed rate doctrines in reviewing and ultimately upholding the Commission's acceptance of tariff amendments permitting the imposition of a CTC. Again, peti-

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That contention overlooks FPA Section 205, 16 U.S.C. 824d, under which public utilities subject to FERC's jurisdiction, such as NEPCO, may file, and FERC may approve, lawful amendments to tariffs governing wholesale power sales. As NEPCO's tariff amendment was precisely the type of filing permitted by that provision, no additional authority, under Order No. 888 or any other rule, was required.

tioner claims no more than a misapplication of settled legal principles to the facts of this case. In any event, petitioner's claims of error are mistaken.

a. Under the *Mobile-Sierra* doctrine, the Commission may not approve filed-for changes to a contract that are inconsistent with existing contractual obligations, absent a finding that such changes are in the public interest. The court of appeals held that FERC's approval of NEPCO's tariff amendment giving customers something they did not have before, *i.e.*, the ability to terminate long-term contracts early subject to payment of a CTC, triggered no *Mobile-Sierra* concerns. Pet. App. 12a. Regardless of the tariff amendment, petitioner remained free to continue to require NEPCO to supply it with power under the terms of its existing contract until, in the normal course, the contract expired by its terms. Because the tariff amendment did not impose any new contractual obligation on petitioner or alter any existing contractual obligation to petitioner's detriment, the court of appeals rightly confirmed that petitioner could have no objection to the tariff amendment under the *Mobile-Sierra* doctrine.[9]

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[9] Petitioner argues (Pet. 22) that the court of appeals erred in holding that the CTC merely gave petitioner an option to terminate that it had not previously had. According to petitioner (Pet. 22), FERC did not allow the CTC until May 15, 1998, almost a month after petitioner had terminated its contract with NEPCO on April 22, 1998, and therefore subjected itself to the CTC. NEPCO, however, had filed the CTC with FERC on March 18, 1998, and it was accepted to be effective as of March 31, 1998. See Pet. App. 102a. Accordingly, at the time of the termination of petitioner's contract with NEPCO, petitioner was already on notice of the CTC, and the CTC was in fact made effective prior to the date of the termination.

b. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Below, petitioner argued that the obligation to pay a CTC under the revised tariff provisions approved by FERC was retroactive because it was imposed after petitioner had ceased making purchases from NEPCO. Pet. App. 13a. As the court of appeals observed, however, the tariff change governed only future purchases of power or failures to purchase power from NEPCO, and not rates for purchases made by petitioner in the past. *Ibid.* Because the court of appeals was manifestly correct on this point—the CTC being triggered by the wholesale customer's exercise of a newly-created option—there was no misapplication of the filed rate doctrine.

c. Petitioner's final claim (Pet. 24-27) is that FERC improperly declined to hold an evidentiary hearing. As the Commission found, and the court of appeals affirmed, petitioner's proffer simply did not support its claims of undue discrimination. See Pet. App. 16a-19a. Under those circumstances, it was no abuse of discretion for the Commission to rely on the evidence submitted and to resolve the issues on the written record and without further trial-type evidentiary hearings. See *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 241 (1973); *Moreau* v. *FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *American Pub. Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1066 (D.C. Cir. 1977).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1914

In The

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

NEW ENGLAND POWER COMPANY
Intervenor.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

REPLY TO THE FEDERAL ENERGY REGULATORY COMMISSION'S BRIEF IN OPPOSITION

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17pp

QUESTION PRESENTED

The FERC's question presented, Op. Br. at (I), fails to address the key issues posed by Norwood's petition for writ of *certiorari* which relate to whether the FERC, in approving a major utility's voluntary plan to divest its generating facilities conditioned on (1) the payment of billions of dollars by consumers for alleged stranded costs involving those facilities; (2) the setting of fixed prices for up to twelve years for standard offer wholesale power in New England not based on cost of service or actual market prices; and (3) the filing for stranded costs as to non-affiliates twice as high as those paid by affiliates and denial of any standard offer service to non-affiliates, is in conflict with FERC's authority under the Federal Power Act, and Order 888 "intended to favor the development of a competitive generation market, so that the efficiencies of the new marketplace will be available to customers in the form of lower costs for electricity. . .to eliminate undue discrimination,"[1] as well as the Court's *Mobile-Sierra* doctrine,[2] the filed rate doctrine of *Arkansas-Louisiana Gas v. Hall*,[3] and the FERC's obligation confirmed by the D.C. Circuit in *Transmission Access Policy Study Group v. FERC* (June 30, 2000)[4] to provide an evidentiary hearing as a condition precedent to approving any stranded costs against customers.

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[1] Order No. 888-A, 62 Fed. Reg. 12274 (1997), *FERC Regulations Preambles*, ¶31,048 at 30,203 (1997).

[2] *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[3] 453 U.S., 571 (1981).

[4] *Transmission Access Policy Study Group , et al. v. FERC*, 2000 U.S. App. LEXIS 15362 *75.

Finally, the question presented by FERC errs in stating that Norwood was allowed the option of terminating its power contract early for payment of a CTC when, in fact, Norwood had no such option.

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No. 99-1914

In The

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

NEW ENGLAND POWER COMPANY
Intervenor.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

REPLY TO THE FEDERAL ENERGY REGULATORY COMMISSION'S BRIEF IN OPPOSITION

COUNTERSTATEMENT

In the present case, New England Power Co. ("NEP" or "NEPCO"), decided voluntarily to divest its generating facilities. NEP entered into an agreement on September 30,

1996 [1] with its affiliates and U.S. Generating Company, a subsidiary of Pacific Gas & Electric Company, conditioned on the payment of alleged stranded costs (called "contract termination charges" ("CTC")) in the amount of $7.6 billion. The agreement also fixed prices for wholesale standard offer power service to be made available to NEP's distribution company affiliates, Mass Electric and Narragansett, for up to 12 years at prices that were below the wholesale market price in New England for the first four years, which would effectively lock in NEP's retail customers to PG&E. PG&E paid a premium of $500 million for this advantage.

In the initial proceedings involving the filing of the agreement by NEP, the Commission terminated previously ordered evidentiary hearings, 78 FERC ¶61,080 (1997), before any testimony and exhibits were formally filed by the intervenors. Norwood moved to file affidavits of its expert witnesses, Dr. John W. Wilson and Robert Towers, demonstrating that the $7.6 billion in stranded costs (CTC) exceeded the standards established by the Commission in its Order No. 888 for calculating any stranded costs by 42% and, in addition, that the standard offer rates denied to Norwood were anticompetitive. The Commission summarily approved the agreement in a short letter order issued November 26, 1997, denied Norwood's request for a hearing, and made no review of Norwood's evidence. App. 29a; 81 FERC ¶61,281, 62,371 (1997).

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[1] The statement by FERC in opposition that the wholesale standard offer rates were based on prices "set by the Massachusetts and Rhode Island regulatory authorities under their retail restructuring programs", Op. Br. at 5, misstates the facts. The wholesale prices in the agreement filed at FERC controlled the state commissions, who have no authority to determine any wholesale rates. In essence, NEP and PG&E initially fixed the prices.

Subsequently, in a second proceeding, NEP sought limited approval from FERC under Section 203 of the FPA, 16 U.S.C. §824b(b), relating to its divestiture of generation related facilities,[2] termination of Tariff No. 1 service to its affiliates, conversion of Norwood's cost of service contract into a fixed, frozen rate, and denial of any standard offer wholesale service to Norwood.[3] Again, the Commission summarily approved the filing and provided no evidentiary hearing.

Norwood, relying on the clear language of FERC's Regulations precluding any stranded costs on Norwood because it obtained open access in 1983 pursuant to an antitrust decree and order requiring Boston Edison to transmit NEP's power to Norwood, then entered into a new power contract on March 3, 1998 with Northeast Utilities ("NU"). That contract was filed and unilaterally approved by FERC on April 22, 1998 as Norwood's new filed rate and was never appealed by NEP.

NEP, in a third proceeding at FERC, unilaterally filed a change to its old Tariff No. 1 which provided that any non-affiliated customer at its option could terminate service by paying a set stranded cost (CTC) to NEP that was twice as high as the CTC which NEP had agreed to for its affiliates

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[2] The FERC has no jurisdiction under the Federal Power Act to require any public utility subject to its jurisdiction to divest its generating facilities. Section 201 of the Federal Power Act expressly provides that the FERC "shall not have jurisdiction . . . over facilities used for generation of electric energy. . ." 16 U.S.C. §824(b).

[3] In approving NEP's application under Section 203, the Commission admitted that it had accepted the standard offer fixed prices without any review as to whether they were just and reasonable: "Norwood is correct that the rates are not based on USGenNE's costs; however, USGenNE is seeking approval of these rates under its market-based rate proposal." App. 74a; 82 FERC at 61,665.

(calculated to be $78 million for Norwood). This CTC was not filed by NEP prior to Norwood entering into its new contract with NU and was not approved by FERC until after it had approved Norwood's NU contract. Norwood raised legal objections to the new NEP CTC, and, in the alternative, requested an evidentiary hearing based on the fact that Norwood would be paying a stranded cost CTC 100% higher than that approved by FERC for NEP's affiliates, despite the fact that NEP's affiliates were transmission customers subject to stranded cost charges under Order 888, while Norwood was not. The FERC summarily approved NEP's CTC tariff and denied any evidentiary hearing on May 15, 1998, App. 102a-110a, and denied rehearing on August 5, 1998. App. 111a-116a.

FERC counsel's theme throughout its brief is that the CTC amendment gave Norwood an option it did not have previously and, therefore, the *Mobile-Sierra* doctrine, filed rate doctrine under *Arkla*, and Norwood's illegal damages claim do not apply. This argument is incorrect. The amendment may have been an option available to NEP's other bundled nonaffiliated customers, but was not an option available to Norwood as can be seen from the chronology of events.

On March 4, 1998, Norwood notified NEP that it had entered a new power contract with Northeast Utilities (NU) on March 3, 1998 for service to commence April 1, 1998. This new NU contract was approved by FERC on April 22, 1998 as Norwood's new filed rate, which NEP never challenged. Subsequently, on May 15, 1998, FERC approved NEP's CTC amendment (filed March 18, 1998). Thus, Norwood's new filed rate was approved by FERC prior to NEP's CTC, which was not filed by NEP until after Norwood entered its new contract.

ARGUMENT

FERC improperly contends that the decision of the court of appeals below does not conflict with any decision of this Court or any other court of appeals.

1. The court of appeals below erred in ruling that NEP could impose parallel-type "stranded costs" on Norwood expressly not authorized by FERC's Regulations, contrary to the rulings of this Court and many courts of appeals that FERC is bound by its own regulations. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984); *Williams Natural Gas Co. v. FERC*, 944 F.2d 1320, 1328 (D.C. Cir. 1991). FERC's general Regulations, 18 C.F.R. §35.26, explicitly "establishes the standard that a public utility . . . must satisfy in order to recover stranded costs." App. 123a-124a; emphasis added. Both the court below and FERC conceded that "stranded costs" were involved in NEP's filings. App. 28a, 103a and 10a. FERC admitted before the court below and the court affirmed that Norwood was not subject to any stranded costs under the Regulations. App. 10a. However, the court below approved NEP's CTC filing as to Norwood based on one cite from Order 888 not cited in FERC's decisions below, but advanced by FERC's counsel in their brief, and the statement that Norwood had an option of whether or not to choose the CTC. As shown at ¶4, *infra*, Norwood had no such option. The one authority cited by FERC's counsel adopted by the court from Order 888 and two other cites from Order 888-A now cited by FERC's counsel, never adopted by the FERC or the court below, do not authorize any exemption from FERC's Regulations. [4]

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[4] FERC counsel's first cite of Order 888, 61 Fed. Reg. 21,662, Op. Br. at note 7, was not cited by FERC in its orders below but was by the court below, and misses the mark. This ten line section of

Since neither the FERC nor court below could cite any established rationale or legal authority for the "imposition of stranded costs" against Norwood, there simply was no valid, legal basis for the FERC's summary approval of NEP's filing. The court below's failure to identify any other sources of legal authority, (to justify a plain conflict with FERC's Regulations governing the imposition of stranded costs by any utility), clearly violated precedents of this Court as well as other circuits. *See also, Atchison, Topeka & Santa Fe* and *Distrigas of Massachusetts Corp.*, Pet. 16.

Order 888 addresses the threshold question of whether or not "stranded costs" should be allowed at all if the generating utility voluntarily divested. It did not deal with any hypothesis that "stranded costs" could be collected from a non-transmission dependant customer, contrary to the express mandate of the regulations. FERC counsel's second cite of Order 888-A, 62 Fed Reg. 12,382, Op. Br. at note 7, also not cited by FERC in its orders below but raised by its counsel in its brief to the court of appeals, and never adopted by that court, is applicable to former bundled wholesale requirements customers which Norwood has never been. In addition, it comes from a section of Order 888 titled "Rehearing Requests Seeking Broader Stranded Costs Recovery" where the Commission denied requests to "expand the scope of stranded cost recovery to include situations in which the departing customer does not take unbundled transmission from its former supplier." Order 888-A, 62 Fed. Reg. 12,381. FERC counsel's third cite of Order 888-A, 62 Fed Reg 12,406, not cited by either FERC in its orders or the court below, is clearly irrelevant because it relates to retail-turned-wholesale customers, which has nothing to do with Norwood. In addition, all of the sections for authority to assess stranded costs on Norwood cited by FERC's Orders, FERC's attorneys, and the court of appeals are not applicable to Norwood as they never were a bundled wholesale customer and are not now transmission dependant on NEP. Any attempt to link "stranded costs" to Norwood with a "separate (although parallel) justification" via Order 888 fails. Furthermore, FERC, its attorneys, and the court below have never cited any valid authority under any rule, regulation, or precedent under Section 205 of the FPA for the imposition of any charge of this type as FERC has suggested is possible at Op. Br., footnote 8.

2. FERC admits that the court of appeals' decision below properly held that issues of breach of contract and damages therefore were within the jurisdiction of the courts and agrees that the Commission "neither interpreted petitioner's contract with NEPCO nor determined whether petitioner breached its contract with NEPCO," and that "[t]he Commission's decision does not address the situation of customers breaching their contracts." Op. Br. at 13.

FERC now claims that there is no significant question of contract law or any irreconcilable conflict because the CTC was an option available to Norwood and also because the Commission's decision did not address breach of contract. Op. Br. at 13. The FERC is in error because, as Norwood has shown at ¶4, *infra*, the option did not apply to Norwood. The Commission may claim it did not address breach of contract issues but the court of appeals agrees that any application of the CTC against Norwood (where Norwood had no option) is indistinguishable from breach of contract damages. "The termination charge is certainly a detriment, but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if [petitioner] had no option but simply breached the existing contract." Emphasis added. App. 12a.

FERC's back door attempt, without any analysis of the contract or relevant facts involved, to determine breach of contract damages, especially where it admittedly has never determined whether any breach of contract occurred, poses a new, major issue of law warranting this Court's consideration. Pet. 17-18.

3. FERC's arguments that the Commission and court of appeals below did not violate this Court's *Mobile-Sierra* doctrine, Op. Br. at 13-14, fail.

The court of appeals and FERC both agree that the CTC would be a violation of *Mobile-Sierra* if the CTC had not been an option to Norwood, which gave Norwood something it did not have before. Op. Br. at 9 and 14. Whereas, Norwood has conclusively shown that Norwood had no such option, ¶4, *infra*, the CTC was a violation of *Mobile-Sierra.*

In addition, since the CTC purported to require Norwood to pay for electric power that it was not receiving from the Company, this unilateral tariff filing by NEP conflicted with the terms of Norwood's Power Contract which expressly barred any tariff filing by NEP that conflicted with the terms of the Power Contract. Similarly, FERC's conversion of Norwood's cost of service rate under Tariff No. 1, based on FERC's regulated cost of service, to a fixed-rate contract, also conflicted with the plain language of the Power Contract requiring service to Norwood only under "Tariff No. 1." Both of these changes to Norwood's power contract are violations of *Mobile-Sierra*. As FERC notes, "the Commission may not approve filed-for changes to a contract that are inconsistent with existing contractual obligations, absent a finding that such charges are in the public interest." Op. Br. at 14.

4. FERC, in agreement with the court of appeals, argues that because of "the CTC being triggered by the wholesale customer's exercise of a newly-created option -- there is no misapplication of the filed rate doctrine." Op. Br. at 15. Since no such option applied to Norwood, all of Norwood's claims regarding *Arkansas-Hall* and the filed rate doctrine are valid. Pet. Br. at 21-24.

FERC's opposition misconstrues *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkla*"), holding that "the Commission itself has no power to alter a rate retroactively." 453 U.S. at 578. At the time that Norwood

entered a new contract for power service with Northeast Utilities on March 4, 1998, NEP had no CTC on file approved by the FERC applicable to Norwood. Furthermore, FERC approved Norwood's new power contract with Northeast Utilities as Norwood's new filed rate on April 22, 1998, without any conditions or restrictions, and NEP never appealed that decision. FERC's subsequent attempt in an order issued May 15, 1998 to impose a new CTC applicable to Norwood under its old Tariff 1 with NEP, "effective March 31, 1998" was an unlawful retroactive ratemaking barred by *Arkla.* [5]

The court of appeals' decision below that "the tariff change governed only future purchases of power or failures to purchase power from NEPCO, and not rates for purchases made by petitioner in the past", Op. Br. at 15, represents a major alteration of the filed rate doctrine, because past costs which would be collected in the future, is a retroactive rate. Clearly, the CTC did not govern any future purchases of power by Norwood from NEP. Conversely, Norwood's "failures to purchase power from NEPCO" had already occurred before NEP's CTC was filed and approved. Furthermore, the FERC concedes that the CTC sought to collect past costs when it states that the CTC was "to reimburse NEPCO for a portion of the costs it had incurred [in the past] in preparing to meet its obligation to provide power to the affiliates over the full time of their long-term contracts." Op. Br. at 5.

5. The court of appeals decision below upholding FERC's summary approval of each of the orders below without

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[5] *See, also, Electrical District No. 1 v. FERC* where the D.C. Circuit held that the filed rate doctrine provided "the necessary predictability" and that "wholesale purchasers of electricity cannot plan their activities unless they know the costs of what they are receiving ..." Pet. 22

granting Norwood an evidentiary hearing, directly conflicts with a recent decision of the court of appeals for the District of Columbia Circuit, *Transmission Access Policy Study Group v. FERC*, 2000 U.S. App. LEXIS 15362 (June 30, 2000). That case holds that only after an evidentiary hearing may the Commission award stranded costs:

> . . . Order 888 awards stranded costs to no one. It does nothing more than establish a mechanism by which utilities may seek to recover stranded costs. To recover stranded costs, a utility must demonstrate its continued expectation of service at an evidentiary hearing. . . . Only after such a hearing may FERC decide whether a utility can recover stranded costs and, if so, how much.

Id. at *75; emphasis added; *cf. Southern California Edison Co. v. FERC*, 172 F.3d 74 (D.C. Cir. 1999). This directly conflicts with the decision of the court of appeals below on an important issue affecting open access in the United States, and warrants review by this Court.

CONCLUSION

For the foregoing reasons, petitioner requests that its petition for writ of *certiorari* be granted.

Respectfully submitted,

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September 5, 2000